TRANSCRIPT OF RECORD.

71907

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 658 289

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MARY AGNES WALSH, ADMINISTRATRIX OF THE ESTATE OF DANIEL JOSEPH WALSH, DECEASED.

No. 559 290

MARY AGNES WALSH, ADMINISTRATRIX OF THE ESTATE OF DANIEL JOSEPH WALSH, DECEASED, PLAINTIFF IN ERROR,

vs.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED MAY 16, 1910.

(22,179 and 22,180.)

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MARY AGNES WALSH, ADMINISTRATRIX OF THE ESTATE OF DANIEL JOSEPH WALSH, DECEASED.

No. 559.

MARY AGNES WALSH, ADMINISTRATRIX OF THE ESTATE OF DANIEL JOSEPH WALSH, DECEASED, PLAINTIFF IN ERROR,

vs.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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Defendant's Writ of Error.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Mary Agnes Walsh, a resident of New London, in the State of Connecticut, an alien, subject of Edward the Seventh, King of the United Kingdom of Great Britain and Ireland, administratrix of the estate of Daniel Joseph Walsh, late of said New London, duly appointed by the Probate Court for the District of New London, in Connecticut, and the Probate Court for the Court of Suffolk, in Massachusetts, plaintiff, and the New York, New Haven and Hartford Railroad Company, a corporation organized under the laws of the Commonwealth of Massachusetts, and a citizen thereof, having an usual place of business, at Boston, in the District of Massachusetts, defendant, a manifest error hath happened, to the great damage of the said defendant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the* 16th day of May current, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eleventh day of May, in the year of our Lord one thousand nine hundred and ten.

CHARLES K. DARLING,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

May 11, 1910.

Allowed by
CLARENCE HALE,
U. S. District Judge.

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*Not exceeding 30 days from the day of signing the citation. Rule 14, Sec. 5.

2 *Return of Circuit Court on Writ of Error.*

CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the Judges of the Circuit Court of the United States, in and for the District of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, Charles K. Darling, Clerk of said Circuit Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this 13th day of May, A. D. 1910.

[Seal of the Circuit Court, Massachusetts.]

CHARLES K. DARLING, *Clerk.*

3 *Plaintiff's Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Mary Agnes Walsh, a resident of New London, in the State of Connecticut, an alien, subject of Edward the Seventh, King of the United Kingdom of Great Britain and Ireland, administratrix of the estate of Daniel Joseph Walsh, late of said New London, duly appointed by the Probate Court for the District of New London, in Connecticut, and the Probate Court for the Court of Suffolk, in Massachusetts, plaintiff, and the New York, New Haven and Hartford Railroad Company, a corporation organized under the laws of the Commonwealth of Massachusetts, and a citizen thereof, having an usual place of business, at Boston, in the District of Massachusetts, defendant, a manifest error hath happened, to the great damage of the said plaintiff as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the* 16th day of May current, in the said Supreme Court, that the record

and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eleventh day of May, in the year of our Lord one thousand nine hundred and ten.

CHARLES K. DARLING,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

May 11, 1910.

Allowed by
CLARENCE HALE,
Dist. Judge.

---

*Not exceeding 30 days from the day of signing the citation. Rule 14, Sec. 5.

4 *Return of Circuit Court on Writ of Error.*

CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the Judges of the Circuit Court of the United States, in and for the District of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, Charles K. Darling, Clerk of said Circuit Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this 13th day of May, A. D. 1910.

[Seal of the Circuit Court, Massachusetts.]

CHARLES K. DARLING, *Clerk.*

5 *Transcript of Record of Circuit Court.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on Wednesday, the twenty third day of February, the last Tuesday of February being a legal holiday, in the year of our Lord one thousand nine hundred and ten.

Before the Honorable Francis C. Lowell, Circuit Judge.

No. 605. Law Docket.

MARY AGNES WALSH, Administratrix, Plaintiff,
v.
NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Defendant.

The Writ and Declaration in this cause were filed in the clerk's office of this court on the nineteenth day of July, A. D. 1909, and are in the words and figures following:

6 *Writ.*

MASSACHUSETTS DISTRICT, *ss:*

[L. S.]

The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods or estate of New York, New Haven and Hartford Railroad Company, a corporation organized under the laws of the Commonwealth of Massachusetts, and a citizen thereof, having an usual place of business at Boston, in our District of Massachusetts, to the value of twenty five thousand dollars, and summon it, (if it may be found in your District) to appear before our Judges of our Circuit Court of said United States, for the First Circuit, next to be holden at Boston, within and for our said District of Massachusetts, on the third Tuesday of October next: then and there in our said Court to answer unto Mary Agnes Walsh, now residing in New London, in the State of Connecticut, an alien, subject of Edward the Seventh, King of the United Kingdom of Great Britain and Ireland, as she is administratrix of the estate of Daniel Joseph Walsh, late of said New London, duly appointed by the Probate Court for the District of New London, in said Connecticut, and the Probate Court for the County of Suffolk, in said Massachusetts, plaintiff. In an action of tort: to the damage of the said plaintiff, as she says, the sum of twenty five thousand dollars, which shall then and there be made to appear, with other due damages.

And have you there this writ with your doings therein.

7 Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, at Boston, the sixteenth day of July, in the year of our Lord one thousand nine hundred and nine.

CHARLES K. DARLING, *Clerk.*

Officer's Return on Writ.

BOSTON, *July 17th*, 1909.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Pursuant hereunto I have this day attached a chip as the property of the within named defendant corporation, and on the same day I summoned the said defendant corporation to appear at Court and answer as herein directed by delivering to T. E. Byrnes, Vice President of the said defendant corporation at Boston, an original summons to this writ.

J. H. WATERS,
Deputy U. S. Marshal.

Fees.

Service	$2.00	
Travel	.12	$2.12

8 *Declaration.*

(Filed July 19, 1909.)

Now comes the plaintiff, Mary Agnes Walsh, residing in New London in the State of Connecticut, who is an alien, a subject of Edward VII., King of the United Kingdom of Great Britain and Ireland, and avers that she is the duly appointed, qualified and acting administratrix of the estate of Daniel Joseph Walsh, deceased, who last dwelt in said New London; and was so duly appointed by the Probate Court of the County of New London in the State of Connecticut by letters of administration on said estate duly issued to her thereby; and was also duly appointed by the Probate Court for the County of Suffolk and the Commonwealth of Massachusetts by letters of administration on said estate duly issued to her thereby; and that the defendant, the New York, New Haven & Hartford Railroad Company, is a corporation duly organized under the laws of said Commonwealth of Massachusetts, and a citizen thereof, and is engaged in commerce between the several states and has a usual place of business in Boston in said District; and that the defendant was a corporation and was so engaged in such commerce on the eleventh day of February, 1909; that for the purpose of such commerce between the several states the defendant maintained a yard in the County of New London and State of Connecticut and there employed the plaintiff's intestate in such commerce; and while the plaintiff's intestate was engaged in replacing a draw bar on one of the defendant's cars then in use in such commerce or in other similar or kindred work on such car, he was severely injured by reason of the negligence of the officers, agents or employees of said
9 carrier in pushing another car or cars against the car or cars on which the plaintiff's intestate was working, causing said

intestate to be run over. And the plaintiff's intestate suffered great pain of body and anguish of mind.

Wherefore the plaintiff as such administratrix prays judgment against the defendant for the sum of twenty five thousand dollars ($25,000) and costs.

Count 2.

Now comes the plaintiff, Mary Agnes Walsh, residing in New London in the State of Connecticut, who is an alien, a subject of Edward VII., King of the United Kingdom of Great Britain and Ireland, and avers that she is the duly appointed, qualified and acting administratrix of the estate of Daniel Joseph Walsh, deceased, who last dwelt in said New London; and was so duly appointed by the Probate Court of the County of New London in the State of
10 Connecticut by letters of administration on said estate duly issued to her thereby; and was duly appointed by the Probate Court for the County of Suffolk and the Commonwealth of Massachusetts by letters of administration on said estate duly issued; to her thereby; and that the defendant, the New York, New Haven & Hartford Railroad Company, is a corporation duly organized under the laws of said Commonwealth of Massachusetts, and a citizen thereof, and is engaged in commerce between the several states and has a usual place of business in Boston in said district; and that the defendant was a corporation and was so engaged in such commerce on the eleventh day of February, 1909; that for the purpose of such commerce between the several states the defendant maintained a yard in the County of New London and State of Connecticut and there employed the plaintiff's intestate in such commerce; and while the plaintiff's intestate was engaged in replacing a draw bar on one of the defendant's cars then in use in such commerce, or in other similar or kindred work on such car, he was so injured by reason of the negligence of the officers, agents or employees of said carrier in pushing another car or cars against the car or cars on which the plaintiff's intestate was working, that he died of the injuries so received; that said Daniel Joseph Walsh left surviving him Mary Agnes, his widow, the plaintiff herein, and also James Edward, aged four years, Daniel Joseph, aged two years, and William Patrick, aged four months, his only heirs and next of kin, which widow and children were dependent on him for support, and that said action is brought by the plaintiff for the benefit of the surviving widow and children.

11 Wherefore the plaintiff as such administratrix prays judgment against the defendant for the sum of twenty-five thousand dollars ($25,000) and costs.

Count 3.

Now comes the plaintiff, Mary Agnes Walsh, residing in New London in the State of Connecticut, who is an alien, a subject of Edward VII. King of the United Kingdom of Great Britain and Ireland, and avers that she is the duly appointed, qualified and acting administratrix of the estate of Daniel Joseph Walsh, deceased, who

last dwelt in said New London; and was so duly appointed by the Probate Court of the County of New London in the State of Connecticut by letters of administration on said estate duly issued to her thereby; and was also duly appointed by the probate Court for the County of Suffolk and the Commonwealth of Massachusetts by letters of administration on said estate duly issued to her thereby; and that the defendant, the New York, New Haven & Hartford Railroad Company, is a corporation duly organized under the laws of said Commonwealth of Massachusetts, and a citizen thereof, and is engaged in commerce between the several states and has a usual place of business in Boston in said district; and that the defendant was a corporation and was so engaged in such commerce on the eleventh day of February, 1909; that for the purpose of such commerce between the several states the defendant maintained a yard in the County of New London and State of Connecticut and there employed the plaintiff's intestate in such commerce; and while the plaintiff's intestate was engaged in replacing a draw bar on one of the defendant's cars then in use in such commerce, or in other similar or kindred work on such car, he was so injured by reason of the
12 negligence of the officers, agents or employees of said carrier in pushing another car or cars against the car or cars on which the plaintiff's intestate was working, that he suffered great pain of body and anguish of mind for many hours and died by reason of the injuries so caused. That said Daniel Joseph Walsh left surviving him Mary Agnes, his widow, the plaintiff herein, and also James Edward, aged four years, Daniel Joseph, aged two years, and William Patrick, aged four months, his only heirs and next of kin, which widow and children were dependent on him for support, and that said action is brought by the plaintiff for the benefit of the surviving widow and children.

Wherefore, the plaintiff as such administratrix prays judgment against the defendant for the sum of twenty-five thousand dollars ($25,000) and costs.

Count 4.

Now comes the plaintiff, Mary Agnes Walsh, residing in New London in the State of Connecticut, who is an alien, a subject of Edward VII, King of the United Kingdom of Great Britain and Ireland, and avers that she is the duly appointed, qualified and acting administratrix of the estate of Daniel Joseph Walsh, deceased, who last dwelt in said New London, and was so duly appointed by the Probate Court of the County of New London in the State of Connecticut by letters of administration on said estate duly issued to her thereby; and was also duly appointed by the Probate Court for the County of Suffolk and the Commonwealth of Massachusetts by letters of administration on said estate duly issued to her thereby; and that the defendant, the New York, New Haven & Hart-
13 ford Railroad Company, is a corporation duly organized under the laws of said Commonwealth of Massachusetts, and a citizen thereof, and is engaged in commerce between the several states and has a usual place of business in Boston in said district; and that the defendant was a corporation and was so engaged in

such commerce on the eleventh day of February, 1909; that for the purpose of such commerce between the several states the defendant maintained a yard in the County of New London and State of Connecticut and there employed the plaintiff's intestate in such commerce; and while the plaintiff's intestate was engaged in replacing a draw bar on one of the defendant's cars then in use in such commerce, or in other similar or kindred work on such car, he was severely injured by reason of a defect or insufficiency due to the defendant's negligence in its cars, engines, appliances, machinery, track, road bed, works or other equipment, causing said intestate to be run over. And the plaintiff's intestate suffered great pain of body and anguish of mind.

Wherefore, the plaintiff as such administratrix prays judgment against the defendant for the sum of twenty-five thousand dollars ($25,000) and costs.

Count 5.

Now comes the plaintiff, Mary Agnes Walsh, residing in New London in the State of Connecticut, who is an alien, a subject of Edward VII, King of the United Kingdom of Great Britain
14 and Ireland, and avers that she is the duly appointed, qualified and acting administratrix of the estate of Daniel Joseph Walsh, deceased, who last dwelt in said New London; and was so duly appointed by the Probate Court of the County of New London in the State of Connecticut by letters of administration on said estate duly issued to her thereby; and was also duly appointed by the Probate Court for the County of Suffolk and the Commonwealth of Massachusetts by letters of administration on said estate duly issued to her thereby; and that the defendant, the New York, New Haven & Hartford Railroad Company, *Company* is a corporation duly organized under the laws of said Commonwealth of Massachusetts, and a citizen thereof, and is engaged in commerce between the several states and has a usual place of business in Boston in said district; and that the defendant was a corporation and was so engaged in such commerce on the eleventh day of February, 1909; that for the purpose of such commerce between the several states the defendant maintained a yard in the County of New London and State of Connecticut and there employed the plaintiff's intestate in such commerce; and while the plaintiff's intestate was engaged in replacing a draw bar on one of the defendant's cars then in use in such commerce, or in other similar or kindred work on such car, he was so injured by reason of a defect or insufficiency due to the defendant's negligence in its cars, engines, appliances, machinery, track, road bed, works or other equipment, that he died of the injuries so received; that said Daniel Joseph Walsh left surviving him Mary Agnes, his widow, the plaintiff herein, and also James Edward, aged four years, Daniel Joseph, aged two years, and William Patrick, aged four months, his only heirs and next of kin, which widow and children were dependent on him for support; and that said action is brought
15 by the plaintiff for the benefit of the surviving widow and children.

Wherefore, the plaintiff as such administratrix prays judgment against the defendant for the sum of twenty-five thousand dollars ($25,000) and costs.

Count 6.

Now comes the plaintiff, Mary Agnes Walsh, residing in New London in the State of Connecticut, who is an alien, a subject of Edward VII, King of the United Kingdom of Great Britain and Ireland, and avers that she is the duly appointed, qualified and acting administratrix of the estate of Daniel Joseph Walsh, deceased, who last dwelt in said New London; and was so duly appointed by the Probate Court of the County of New London in the State of Connecticut by letters of administration on said estate duly issued to her thereby; and was also duly appointed by the Probate Court for the County of Suffolk and the Commonwealth of Massachusetts by letters of administration on said estate duly issued to her thereby; and that the defendant, the New York, New Haven & Hartford Railroad Company, is a corporation duly organized under the laws of said Commonwealth of Massachusetts and a citizen thereof, and is engaged in commerce between the several states and has a usual place of business in Boston in said district; and that the defendant was a corporation and was so engaged in such commerce on the eleventh day of February, 1909; that for the purpose of such commerce between the several states the defendant maintained a yard in the County of New London and State of Connecticut and there employed the plaintiff's intestate in such commerce;
16 and while the plaintiff's intestate was engaged in replacing a draw bar on one of the defendant's cars then in use in such commerce, or in other similar or kindred work on such car, he was so injured by reason of a defect or insufficiency due to the defendant's negligence in its cars, engines, appliances, machinery, track, road bed, works or other equipment, that he suffered great pain of body and anguish of mind for many hours and died by reason of the injuries so caused. That said Daniel Joseph Walsh left surviving him Mary Agnes, his widow, the plaintiff herein, and also James Edward, aged four years, Daniel Joseph, aged two years, and William Patrick, aged four months, his only heirs and next of kin, which widow and children were dependent on him for support; and that said action is brought by the plaintiff for the benefit of the surviving widow and children.

Wherefore, the plaintiff as such administratrix prays judgment against the defendant for the sum of twenty-five thousand dollars ($25,000) and costs.

Count 7.

Now comes the plaintiff, Mary Agnes Walsh, residing in New London in the State of Connecticut, who is an alien, a subject of Edward VII, King of the United Kingdom of Great Britain and Ireland, and avers that she is the duly appointed, qualified and acting administratrix of the estate of Daniel Joseph Walsh, deceased, who last dwelt in said New London; and was so duly appointed by the Probate Court of the County of New London in the State of

Connecticut by letters of administration on said estate duly issued to her thereby; and was also duly appointed by the Probate Court for the County of Suffolk and Commonwealth of Massachusetts by letters of administration on said estate duly issued to her
17 thereby; and that the defendant, the New York, New Haven & Hartford Railroad Company, is a corporation duly organized under the laws of said Commonwealth of Massachusetts, and a citizen thereof, and is engaged in the carriage of persons and goods in said Commonwealth and in the State of Connecticut and elsewhere, and has a usual place of business in Boston in said district; and that the defendant was a corporation and was so engaged on the eleventh day of February, 1909; that for the purpose of its business the defendant maintained a yard in the County of New London and State of Connecticut and there employed the plaintiff's intestate; that the plaintiff's intestate was set to work to replace a draw bar, to do other similar or kindred work on one of the cars used in the defendant's business, and that the defendant, regardless of its duty in that behalf, did not provide the plaintiff's intestate with a reasonably safe place in which to work or reasonably safe appliances and instrumentalities for his work; that by reason of the negligence of persons selected and empowered by the defendant to act in its behalf and delegated with the duty of providing a reasonably safe place for the plaintiff's intestate to work in and reasonably safe appliances and instrumentalities for his work, the plaintiff's intestate, while exercising due and proper care, was severely injured and suffered great pain of body and anguish of mind; and the plaintiff says that due and proper notice of the time, place and cause of the accident was given to the defendant by the plaintiff.

Wherefore, the plaintiff as such administratrix prays judgment against the defendant for the sum of twenty-five thousand dollars ($25,000) and costs.

18 **Count 8.**

Now comes the plaintiff, Mary Agnes Walsh, residing in New London in the State of Connecticut, who is an alien, a subject of Edward VII, King of the United Kingdom of Great Britain and Ireland, and avers that she is the duly appointed, qualified and acting administratrix of the estate of Daniel Joseph Walsh, deceased, who last dwelt in said New London; and was so duly appointed by the Probate Court of the County of New London in the State of Connecticut by letters of administration on said estate duly issued to her thereby; and was also duly appointed by the Probate Court for the County of Suffolk and Commonwealth of Massachusetts by letters of administration on said estate duly issued to her thereby; and that the defendant, the New York, New Haven & Hartford Railroad Company, is a corporation duly organized under the laws of said Commonwealth of Massachusetts, and a citizen thereof, and is engaged in the carriage of persons and goods in said Commonwealth and in the State of Connecticut and elsewhere, and has a usual place of business in Boston in said district; and that the defendant was a corporation and was so engaged on the eleventh day

of February, 1909; that for the purpose of its business the defendant maintained a yard in the County of New London and State of Connecticut and there employed the plaintiff's intestate; that the plaintiff's intestate was set to work to replace a draw bar or to do other similar or kindred work on one of the cars used in the defendant's business, and that the defendant, regardless of its duty in that behalf, did not provide the plaintiff's intestate with a reasonably safe place in which to work or reasonably safe appliances and in-
19 strumentalities for his work; that by reason of the negligence of persons selected and empowered by the defendant to act in its behalf and delegated with the duty of providing a reasonably safe place for the plaintiff's intestate to work in and reasonably safe appliances and instrumentalities for his work, the plaintiff's intestate, while exercising due and proper care, was severely injured and suffered great pain of body and anguish of mind for many hours, and died by reason of said injuries. That said Daniel Joseph Walsh left surviving him Mary Agnes, his widow, the plaintiff herein, and also James Edward, aged four years, Daniel Joseph, aged two years, and William Patrick, aged four months, his only heirs and next of kin, which widow and children were dependent on him for support; and that said action is brought by the plaintiff for the benefit of the surviving widow and children. And the plaintiff says that due and proper notice of the time, place and cause of the accident was given to the defendant by the plaintiff.

Wherefore, the plaintiff as such administratrix prays judgment against the defendant for the sum of twenty five thousand dollars ($25,000) and costs.

By Her Attorneys, SALTONSTALL, DODGE & CARTER,
ENDICOTT P. SALTONSTALL.

Upon the filing of the writ and declaration herein, the following Order to Plead was entered:

19*a* *Order to Plead.*

July 19, 1909.

The plaintiff, having filed the pleadings on her behalf, pursuant to Rule 12, the defendant, under the provisions of said Rule, is ordered to plead thereto within one calendar month hereafter, subject to the penalty of default.

CHARLES K. DARLING, *Clerk,*
By JOHN E. GILMAN, JR.,
Deputy Clerk.

On the twenty first day of July, A. D. 1909, an Affidavit of Service of Order to Plead was filed.

19*b* On the fifth day of August, A. D. 1909, the following Motion to Set Aside Order to Plead was filed:

Motion to Set Aside Order to Plead.

(Filed Aug. 5, 1909.)

Now comes the defendant in the above entitled action and respectfully represents that the writ in the above entitled action is returnable on the 19th day of October, 1909, and that in accordance with the practice of this court the defendant should be allowed thirty days thereafter within which to answer or to demur but the plaintiff having on the 19th day of July, 1909, filed his writ and declaration in accordance with Rule 12 of this court, an order of this court then issued ordering the defendant to plead within one calendar month from the said 19th day of July, 1909. Your defendant further represents that it is not within the power of this Honorable Court to command the defendant to so plead before the return day of the writ.

Wherefore, your defendant moves that the above order of this Honorable Court be set aside and your defendant be allowed the customary thirty days from the return day of the writ within which to answer.

By Its Attorneys, CHOATE, HALL & STEWART.

On the same day, it was ordered by the Court, the Honorable Francis C. Lowell, Circuit Judge, sitting, that the said Motion to Set Aside Order to Plead be denied.

On the seventh day of August, A. D. 1909, a draft Bill of Exceptions was presented to the Court, by the defendant, under Rule 17.

On the seventeenth day of August, A. D. 1909, the following Defendant's Demurrer was filed:

20 *Defendant's Demurrer.*

(Filed Aug. 17, 1909.)

Now comes the defendant in the above entitled action and demurs to the plaintiff's declaration and the several counts thereof, and for causes of demurrer says:—

(1) That counts 1, 2, 3, 4, 5, 6, 7 and 8 and each of them and the matters and things therein alleged, in the manner and form in which the same are set forth, do not constitute a legal cause of action against this defendant, because, it appearing that said plaintiff, as administratrix, is not a resident of the Commonwealth of Massachusetts, said plaintiff has not alleged the appointment of an agent in accordance with the provisions of Chapter 139, Section 8, of the Revised Laws of Massachusetts.

(2) That counts 1, 2, 3, 4, 5, & 6 and each of them and the matters and things therein alleged, in the manner and form in which the same are set forth, do not constitute a legal cause of action against this defendant, because there is no allegation or averment in said counts that plaintiff's intestate suffered any injury while he

was employed by an interstate carrier in interstate commerce in accordance with the provisions of Chapter 149 of the U. S. Statutes 1907-1908.

21 (3) That counts 1, 2, 3, 4, 5 and 6 and each of them do not state a legal cause of action against this defendant because the act of Congress, upon the provisions of which this alleged cause of action is based, is not constitutional.

(*a*) Because Congress has no power, under Article 1, Sec. 8, of the U. S. Constitution to pass this Act.

(*b*) Because the Act assumes to govern the relations of master and servant as between an interstate carrier and an interstate employee.

(*c*) Because the Act is not in any sense a regulation of commerce among the several States.

(*d*) Because the Act provides a remedy only to an injured employee and is therefore in no sense an Act to Regulate Commerce.

(*e*) Because by the provisions of the Act the defendant would be made liable by reason of the negligence of the interstate employee.

(*f*) Because Congress is prohibited, by the terms of the fifth Amendment to the United States Constitution, to deprive any person of life, liberty or property without due process of law.

(*g*) Because the Act violates the true intent of the fifth Amendment to the United States Constitution.

(*h*) Because the Act is partial in its operation and not founded on reasonable or just classification.

(*i*) Because the Act is not limited in its operation to such classes of employees as might rightfully be embraced within its terms.

(*j*) Because Congress has no power to provide a remedy to an injured employee of an interstate carrier as provided in Sec. 3 of the Act.

(4) That counts 7 and 8 and each of them do not state a legal cause of action against this defendant because they do not aver the existence of any law or statute under which said alleged causes of action are or can be brought

(5) That counts 1, 4, and 7, and each of them, and the matters and things therein alleged, in the manner and form in whic- the same are set forth, do not state a legal cause of action, against

22 this defendant, for there is no proper allegation that the suit is brought by the administratrix for the benefit of the widow *and* children.

CHOATE, HALL & STEWART.

I, John L. Hall, of counsel for the defendant in the above entitled action hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

JOHN L. HALL.

Frank A. Farnham, doth depose and say that he is attorney of the New York, New Haven & Hartford Railroad Company, a corporation, defendant in the above entitled action and that the fore-

going demurrer is not interposed for the purpose of delaying said action, or any of the proceedings therein.

FRANK A. FARNHAM.

Subscribed in my presence and sworn to before me this 17th day of August.

[SEAL.] DANIEL M. GOODRIDGE,
Notary Public.

On the same day, the following Defendant's Answer was filed:

23 *Defendant's Answer.*

(Filed Aug. 17, 1909.)

And now comes the defendant, not admitting but denying the jurisdiction of the court over it in this action, and not waiving but relying upon its demurrer heretofore filed in said cause, and denies each and every allegation in the plaintiff's writ and declaration contained.

By Its Attorneys, CHOATE, HALL & STEWART.

On the fourth day of October, A. D. 1909, the following Plaintiff's Motion to Amend Declaration was filed and allowed by consent:

24 *Plaintiff's Motion to Amend Her Declaration.*

(Filed and allowed by consent Oct. 4, 1909.)

Now comes the plaintiff in the above entitled cause and moves to amend her declaration.

First: By inserting in each count thereof after the clause "and was also duly appointed by the Probate Court for the County of Suffolk in the Commonwealth of Massachusetts by letters of administration on said estate duly issued to her thereby "the words" and she has appointed an agent in said Commonwealth, in accordance with the provisions of R. L. c. 139 s. 8."

Second: By adding at the end of the first paragraph of the seventh count the following: "That this count is brought under the law of the State of Connecticut."

Third: By adding at the end of the first paragraph of the eighth count the following: "This count is brought under the law of Connecticut and under Public Acts of Connecticut 1903 c. 193.

By Her Attorneys, SALTONSTALL, DODGE & CARTER.

On the same day, the following Defendant's Motion to Amend Demurrer was filed and allowed by consent:

25 *Defendant's Motion to Amend Demurrer.*

(Filed and allowed by consent Oct. 4, 1909.)

Now comes the defendant in the above entitled action and moves to amend its demurrer heretofore filed by adding thereto the following:

(6) That Counts 1 and 4, and each of them, and the matters and things therein alleged, in the manner and form in which the same are set forth, do not state a legal cause of action, against this defendant because there is no proper allegation that the plaintiff's intestate died of the injuries received as alleged, nor that the plaintiff brings the action for such death resulting from the negligence alleged.

(7) That Counts 3 and 6, and each of them, and the matters and things therein alleged in the manner and form in which the same are set forth do not state a legal cause of action against this defendant because therein the plaintiff alleges the death of her
26 intestate as result of the negligence alleged and also his pain of body and anguish of mind, and it does not appear which element of damage she relies upon.

(8) That Counts 3 and 6 and each of them is defective because two causes of action are joined in one count.

(9) That Counts 3 and 6 and each of them is defective and insufficient because they are ambiguous.

By its Attorneys, CHOATE, HALL & STEWART.

I, Chas. F. Choate, Jr., of counsel for the defendant, certify that I am of the opinion that there is such probable ground in law for the foregoing demurrer as to make it a fit subject for judicial inquiry, and that the same is not intended for delay.

CHAS. F. CHOATE, JR.

Also on the same day, this cause was set down for hearing on demurrer and fully heard by the Court, the Honorable Francis C. Lowell, Circuit Judge, sitting as aforesaid.

On the sixteenth day of October, A. D. 1909, the following Plaintiff's Motion Further to Amend Declaration was filed:

27 *Plaintiff's Motion Further to Amend Her Declaration.*

(Filed Oct. 16, 1909.)

Now comes the plaintiff in the above entitled cause and moves further to amend her declaration by adding at the end of the first paragraph of the first count and at the end of the first paragraph of the fourth count, the following: "That the said Daniel Joseph Walsh left surviving him, Mary Agnes, his widow, the plaintiff herein and also James Edward aged four years, Daniel Joseph aged two years and William Patrick aged four months, his only heirs

and next of kind, which widow and children were dependent on him for support and that said action is brought by the plaintiff for the benefit of the surviving widow and children."

By Her Attorneys, SALTONSTALL, DODGE & CARTER.

This cause was thence continued to the October Term, A. D 1909, when, to wit, October 25, 1909, this cause came on to be heard on the foregoing motion further to amend declaration and was fully heard by the Court, the Honorable Francis C. Lowell, Circuit Judge, sitting as aforesaid, and it was ordered that said motion be allowed.

28 On the twenty-sixth day of October, A. D. 1909, an Opinion of the Court was announced, sustaining the demurrer on the first, third, fourth and sixth counts, overruling demurrer as to second and fifth counts, and reserving a decision as to the seventh and eighth counts.

On the first day of November, A. D. 1909, draft Bills of Exceptions were presented to the Court under Rule 17, both by the plaintiff and by the defendant.

On the thirtieth day of November, A. D. 1909, the following Defendant's Amended Answer was filed and allowed:

Defendant's Amended Answer.

(Filed and allowed Nov. 30, 1909.)

Now comes the defendant and for further answer says that this action arose out of an injury which occurred in the State of Connecticut upon a line of the railroad operated under the laws of the said State of Connecticut, and over which railroad company this court has no jurisdiction.

By its Attorneys, CHOATE, HALL & STEWART.

On the same day, issue having been joined, a jury was duly empanelled and sworn according to law to try the issue, the Honorable Clarence Hale, District Judge for the District of Maine, duly assigned to hold said Circuit Court, sitting.

On the first day of December, A. D. 1909, this cause was committed to the jury on the seventh and eighth counts of the declaration, who, after hearing all matters and things concerning the same, returned the following Verdict:

29 *Verdict on Seventh and Eighth Counts.*

Dec. 1, 1909.

The jury find for the defendant on the seventh and eighth counts of the plaintiff's declaration.

DANIEL G. HARVEY, *Foreman.*

On the second day of December, A. D. 1909, the following Amended Answer was filed by consent:

Amended Answer.

(Filed by Consent Dec. 2, 1909.)

And now comes the defendant and further answering says that the plaintiff's intestate contributed to the injuries which resulted in his death by his own negligence, and that the damages should be diminished by the jury in proportion to the amount of negligence attributable to the plaintiff's intestate.

By Its Attorneys, CHOATE, HALL & STEWART.

On the third day of December, A. D. 1909, this cause was committed to the jury on the second count of the declaration, and said jury, after hearing all matters and things concerning the same, returned the following Verdict:

Verdict on Second Count.

Dec. 3, 1909.

The jury find for the plaintiff and assess damages in the sum of fifty five hundred dollars, $5500.

DANIEL G. HARVEY, *Foreman.*

30 On the twenty seventh day of January, A. D. 1910, a draft Bill of Exceptions was presented to the Court by the plaintiff under Rule 17, within extended time.

This cause was thence continued to the present February Term, A. D. 1910, when, to wit, March 24, 1910, a draft Bill of Exceptions is presented to the Court by the Defendant, under Rule 17, and within extended time.

On the sixth day of May, A. D. 1910, a Substituted Bill of Exceptions was presented to the Court, by the defendant, under Rule 17.

Also on the same day the following Bills of Exceptions were allowed by the Court:

31 *Defendant's Bill of Exceptions.*

(Draft Bill Filed Aug. 7, 1909; Bill of Exceptions Allowed May 6, 1910.)

In the above entitled action, on July 16, 1909 the plaintiff sued out against the defendant a writ dated July 16, 1909 and returnable on the 19th day of October, 1909.

On the 19th day of June, 1909 the plaintiff, in accordance with Rule 12 of this Honorable Court, having filed his writ and declaration, the court ordered the defendant to plead within one calendar month thereafter.

On August 5, 1909 at a hearing in Chambers before Mr. Justice Lowell, the defendant duly moved that the above order of this Honorable Court be set aside, and that it be allowed thirty days from the return day of said writ within which to answer, which motion was denied by the court.

The defendant duly saved its exceptions to the above order of the court which denied its motion, and being aggrieved reduces its exception to writing and now prays that the same may be allowed.

By Its Attorneys, CHOATE, HALL & STEWART.

May 6, 1910.

Allowed:

FRANCIS C. LOWELL,
Circ. Judge.

32 *Defendant's Bill of Exceptions.*

(Draft Bill Filed Nov. 1, 1909; Bill of Exceptions Allowed May 6, 1910.)

In the above entitled case the plaintiff filed a declaration in eight counts. The defendant filed a demurrer to this declaration. Subsequently the plaintiff filed an amendment to her declaration which was allowed by consent and a further amendment to her declaration which was allowed by the court after hearing, and against defendant's objection.

The defendant duly saved its exception to this ruling of the court.

The defendant filed an amendment to its demurrer which was allowed by consent. The case came on to be heard on the defendant's demurrer as amended to the plaintiff's declaration as amended. The defendant's demurrer was overruled as to the second and the fifth counts and the defendant duly excepted.

The defendant being aggrieved by the several rulings aforesaid, now reduces its exceptions to writing and prays that the same may be allowed.

By Its Attorneys, CHOATE, HALL & STEWART.

May 6, 1910.

Allowed:

FRANCIS C. LOWELL,
Circ. Judge.

33 *Defendant's Substituted Bill of Exceptions.*

(Filed and Allowed May 6, 1910.)

This is an action of tort brought to recover for the injuries and death of Daniel Joseph Walsh on February 11, 1909, while he was alleged to have been employed as a car inspector in a freight yard of the New York, New Haven & Hartford Railroad Company, known as Midway in the State of Connecticut. The pleadings and exhibits and the acts and corporate records put in evidence may be referred to in argument.

The plaintiff in the action is the widow of the said Daniel Joseph Walsh and was duly appointed administratrix of his estate by the Probate Court for the District of New London and the State of Connecticut, and also by the Probate Court for the County of Suffolk and Commonwealth of Massachusetts.

The writ was dated July 16, 1909, and was returnable before the judges of the Circuit Court on the third Tuesday of October, 1909. The writ was duly served upon the defendant on July 17, 1909, and on July 19, 1909, the writ was entered in this court and the declaration filed, and thereupon in accordance with Rule 12 of the Circuit Court for the First Circuit the defendant was ordered to plead within one calendar month. Service of this order upon the defendant was duly made in accordance with said rule, and affidavit of such service duly filed.

34 Upon August 5, 1909, Choate, Hall & Stewart entered a special appearance for the defendant and on the same date made a motion to set aside the order to plead, which motion was denied.

Upon August 7, 1909, the defendant duly filed its exceptions to the ruling of the court denying the motion to set aside the order to plead.

Upon August 17, 1909, the defendant filed its demurrer to the plaintiff's declaration, and on the same day without waiving its demurrer, filed its answer.

Upon October 4, 1909, the plaintiff made a motion to amend her declaration, which motion was allowed by consent; and upon the same day the defendant made a motion to amend its demurrer, which motion was allowed by consent.

Upon October 16, 1909, a motion was made further to amend the plaintiff's declaration, which motion was allowed by the court after hearing upon October 25th.

Upon October 26th the court, Lowell J. filed an opinion sustaining the defendant's demurrer to the first, third, fourth and sixth counts of the plaintiff's declaration, to which ruling the plaintiff duly excepted.

Upon November 1, 1909, the plaintiff filed her bill of exceptions to the ruling of the court sustaining the defendant's demurrer as to the first, third, fourth and sixth counts of the plaintiff's declaration. The court overruled the demurrer as to the second and fifth counts;

and upon November 1st the defendant filed its bill of exceptions to the court's ruling. No objection was at that time made to the seventh and eighth counts of the plaintiff's declaration and the court made no ruling thereon.

The case went to trial upon November 30, 1909, before Hale J. and a jury. On that date the defendant made a motion to
35 amend its answer, which motion was allowed and the plaintiff's exceptions saved.

Upon December 2, 1909, during the trial a motion further to amend the defendant's answer was filed by consent, and was allowed by the court against the plaintiff's objection and her exception was duly saved. The evidence at the trial material to these exceptions is as follows:

PATRICK J. KEATING, a witness called by the plaintiff testified that he lived in New London, Connecticut.

Q. What is your occupation, Mr. Keating?
A. Car inspector at the time.
Q. Car inspector on the New York, New Haven & Hartford Railroad?
A. Yes, sir.

Mr. HALL:

Q. Now I will object to that on the ground I stated to your Honor as to jurisdiction so that my rights may be preserved.

The COURT: I preserve your rights.

Mr. HALL: My reason is this—that the proper way of showing the existence of employment by the defendant is not by asking the witness by whom he is employed and further for the purpose of preserving all my rights on the question of jurisdiction, namely that the Massachusetts Corporation is not in the same jurisdiction as the Connecticut.

Mr. SALTONSTALL: I don't understand what my brother means by the first. As I understand it the whole ground of his objection is that this man works in Connecticut.

The COURT: Is it anything more than this. That he objects to proving an agent by the agent himself.

Mr. HALL: I do not think it encumbent on me to suggest the proper proof. This defendant is responsible for the acts of this man and I object to the manner of proving it. As I stated, that is not the proper way to prove it.

The COURT: Answer subject to the objection.

36 Q. You are car inspector for the New York, New Haven & Hartford Railroad Company?

Mr. HALL: Subject to my exception.
The COURT: Allowed.

Q. How long have you been car inspector, Mr. Keating?
A. 26 months, I guess.
Q. And what were you before you were an inspector, Mr. Keating?

WITNESS: What do you mean?
Mr. SALTONSTALL: Did you work on the railroad?
WITNESS: Yes.

Mr. HALL: I object to that.
Mr. SALTONSTALL: On the same grounds?
Mr. HALL: Because it is leading and the same general grounds which I have already stated.

Q. What did you do for the railroad, if anything, prior to the time that you were car inspector?

Mr. HALL: I object to this line of inquiry.
The COURT: As being testimony tending to show his doing these things in Connecticut?
Mr. HALL: Yes, sir.

Q. Before you were car inspector did you do anything for the railroad company?
A. I worked for the track department.
Q. Now, what were your duties as inspector, what did you do?

Mr. HALL: I object to this whole line of inquiry.

Q. What did you do as inspector?
A. I inspected the cars as fast as they came in.
Q. Suppose that a freight train came into New London, or the yard where you were working, tell the Jury what you would do?
A. I would take a light and inspect on my own side of the train.
Q. By inspecting what do you mean, taking a hammer, what did you do? It is all simple enough to you, but tell us as if we
37 were children.
A. I used to see if there were any defect on any of the cars and then I cut them out.
Q. And you used a lantern to see if there were defects in the cars, and if you found any you cut them out?
A. Yes.
Q. Now take the night the accident happened to Mr. Walsh, did you take one side of the train as usual that night?
A. Yes.
Q. Who was on the other side?
A. Mr. Walsh.

The COURT: The plaintiff's intestate?
Mr. SALTONSTALL: Yes, sir.

Q. Mr. Walsh did work similar to that you did?
A. Yes, the same kind of work.
Q. What did you receive as wages for that work?
A. $17.70 for seven days.
Q. Now, will you tell us what occurred on the night or early morning that Mr. Walsh was killed. Tell the story to the Jury.
A. This train pulled in. I forget the number of it, 345 or 346, and it was called the Boston Extra——

Mr. HALL: I object to this way of putting in facts.
Mr. SALTONSTALL: Supposing an accident happened——

COURT: He may answer, saving Mr. Hall's exception.

Q. You say that the number was 345 or 346?
A. I am not positive about it, sometimes it was 345,—I am not positive about the number.
Q. Could you say whether it was one of the numbers?
A. No, I couldn't.
Q. Now, when the Boston Extra came in where did it come to for you and Mr. Walsh to inspect it, to the yard where the accident happened or down at the depot?

38 Mr. HALL: I object. He said a train named the Boston Extra. I am simply protecting the rights I have here.
COURT: As to where he inspected it he may answer the question.
Mr. SALTONSTALL: I don't want to offend. I am calling this the Boston Extra,—I have always called it the Boston Extra, and——
COURT: I have admitted it.
Mr. HALL: I would like to save my exception.

Q. When this train you call the Boston Extra came in where did it stop for you and Mr. Walsh to inspect it?
A. In Midway Yard.
The witness further testified that the Midway Yard was perhaps 3 or 4 miles east of the New London passenger Station and he and Mr. Walsh inspected the train and saw a broken draft spring and cut out the car; that he wrote "cut out" in chalk on the car; that the car was then taken out of that train and taken down to the repair track, which was track 21; that tracks on that side of the main line where they were working were numbered in odd numbers, 1-3-5-7-9 etc.; that tracks 1 to 19 were long tracks and 21-23- and 25 were known as repair tracks; that repairs were not made on tracks from 1 to 19, that is, to have a man go underneath the cars; that if work was to be done underneath the car it was put on 21-23 or 25; that cars which do not need repairs were occasionally put on tracks 21-23- and 25. Those tracks were known in the yard as the repair tracks; that at the time the car on which he had written "cut out" that night was put on track 21, there were no other cars on that track. After the car was placed on track 21 he went to the yard office and signed off the car on a book; that he put the number and initials of the car and what it was cut out for and got
39 the yard master to put his initials on the carbon. The yard master kept one side of the slip; that the number of the car was 85070, box car; that New York, New Haven & Hartford Rd. was printed on the side of it; after getting the signature or initials on the blank he went over to Walsh and told him that the car contained perishable freight; that that was what the yard master said it contained.
Q. Mr. Keating, if you are told by any one that a car contains perishable fruit, what are your duties as to making repairs, as to when repairs shall be made?

Mr. HALL: That I object to.
COURT: He may answer subject to your objection.

Q. When you are told Mr. Keating, that a car contains perishable freight what are your duties as to making repairs?

A. Well, my duties are to repair a car if I can.

COURT: When?

WITNESS: If I had time to repair the car if the car contained perishable——

Q. When—the next day or at once?

A. At once.

* * * * * * *

Q. Did you have a conversation with Mr. Walsh as to whether it was necessary to repair this car at once—if you can?

A. I did.

Q. As a result of that conversation whether or not Mr. Walsh and yourself proceeded to make the repairs necessary on this car.

Mr. HALL: I object.

COURT: He may answer subject to the objection.

A. We did.

"We went down to the repair track. I went in and got a blue light, cleaned it and he cleaned the tools. I put a blue light on the end of the car. When I got it, the blue light, on the end of the car I went back to him, each man gets his tools, and we went to work underneath the west end of the car and took out this broken draft spring and put a new one in its place, and had it put up again and it was hardly finished when another train pulled in. We left it there and went to inspect the other train. We got as far as within four cars of the head end of the train, and the switcher got on to pull back to switch it and we rode back with the train and inspected the four cars that we didn't have time to inspect first; And we stopped at the crossing shanty and warmed our hands at the fire."

The witness further testified that they then went down to work on the car; that you could see the car from the shanty; that the car was 8 or 10 car lengths of 36 feet apiece; that they walked from the shanty down towards this car and he saw the blue light that he had left on it; that he passed by the blue light; that it was burning all right; that he and Walsh went to work under the car a second time together; that they were at work under the west end of the car which was farthest from the switch and the blue light was on the east end of the car which was the nearest to the switch.

"Well in a few minutes, I should say from 3 to 5 minutes I was working under the car and Kilpatrick, the Yard clerk passed by and I hollered to him and in a couple of minutes the other car came in on us and we were pushed along about 3 car lengths and I went under the brake and hung on where the flange runs out and then I got out from under the car and stepped on the tracks and hollered for Walsh and got no answer. So finally I heard him hollering for me and he asked me to take him out and I stooped under the car and he was piled clean up under the rear brakes, but I got him out from under it and laid him between 21 and 19."

The witness further testified that he did not know the number

of the car that came down upon them; that conductor James Hoban did the switching in that yard; that he saw him switch trains that night, before the accident, on the various tracks; that he
41 doesn't think he told Hoban about this car he "cut out" on the Boston Extra; that Hoban was conductor of a gang; that he saw him switch cars, calling the list and cutting them out; that by switching cars he means putting them over from one track to another; that he worked there day and night and pretty near every day for 3 years. Every time he had been working there he had seen a conductor doing the switching; that Mr. Hobans was the boss conductor of the three men who were doing the switching and he saw Mr. Hobans holding the switching list that night; that he did not hear Mr. Hoban say anything to George Williams telling Williams what track to use; that he did not know the name of the engineer of the train he called the Boston Extra, or the names of the men upon that train and that he can not tell the time the train arrived.

On cross-examination the witness testified:

Q. Did you know what time the train left, Mr. Keating, the train you describe as the Boston Extra?

WITNESS: Left Boston?

Mr. HALL: No, New London that night.

A. That stayed at Midway, that train was in the Midway Yard.

Q. What time did it leave the Midway?

A. That train did not leave the Midway. It stops there at Midway. Part of it is switched off and goes out on another train. The witness further testified "that Midway is about five miles east of New London; that on the night in question it was kind of dark; that it was not cold, not extra cold; it was cold enough; it was not windy; that his regular hours for work were from 6:30 P. M. to 6:30 A. M.; that he saw conductor Hoban that night when he went to work and again shortly after the accident; and he also saw him when the train pulled in; that the accident happened about four o'clock in the morning; that to the best of his recollection the train which he described as the Boston Extra, pulled in about 3:10 A. M.; that conductor Hoban was switching that very train, breaking cars out of the train and putting them on different tracks,
42 and he cannot tell whether he saw conductor Hoban after he had marked "cut out" on the car; that he does not know whether he was nearby; that he was in the west yard, but it is a long territory; that he might be — one end and the witness at the other; that there are two yards, the east yard and the west yard. The east yard was toward Boston and the west yard toward New York; that he inspected only in the west yard; that in a book which is kept at Midway they keep a record of the car, the number of the train and the record of the reason that the car was cut out for; that they cut out lots of cars; that there was hardly any nights but what they had to repair cars. They do not cut cars out for anything except to repair them; that Walsh had worked longer at nights than he had and had been an inspector for a longer period of time; that the

men who were switching placed the car on track 21; that he didn't tell anybody on the main track that he was going under this car; that he only wrote the words "cut out"; that he got signers for it and wrote in a book there was a defect in it and so it was not sent on with the train without repairing; that was the only direction he gave about the car; that when he went to work on the car on track 21 the switching men were at supper; that he didn't see them when he went under the car; that they were putting the cars down on the different tracks in the yard; that he could have told Mr. Hoban that he was going to work underneath that car; that Walsh was with him all the time; that Walsh could have told conductor Hoban; that both of them knew the man were working in the yard; that he knew if he didn't put the blue light on that car he had absolutely no protection.

Q. And if the blue light had not been there, there wasn't anything to prevent cars from coming down if the switching crew threw that switch?

A. Not if there was not a blue light but there was. I took care to put it on there, 'twas my life protection."

43 The witness further testified that he put the blue light there himself and realizes that it is important to show that he did; that he put it on the end sill of the car, which is a steel beam going across the end of the car on a level with the floor; and which was 7 or 8 inches wide; that he placed the lantern about 5 or 6 inches from the draw bar; that after that when they first went to work underneath the car they took down the apron which held the draft spring in place; that might have taken one-half hour. After the second train had pulled in they inspected it for probably one-half hour; that they got within four cars of the end of the train and then rode back pretty near as far as the shanty; that they were in the shanty 2 or 3 minutes warming their fingers; that they walked across the tracks the rest of the way; that they went back on the work they had to do and Hoban and his gang were at work ready to switch the other train; that the men handling the switching that night were Hoban, Lidbury, Berman and Williams; that when he rode back on that train he could have told the men that he was going to work on that car if he wanted to; that the blue lantern was there to protect him; that he told none of the men or Hoban.

Q. And you don't think there is any doubt but that you put that light on the draw bar do you?

A. No doubt. I told you plainly what I did do.

Q. Well now, as a matter of fact don't you know that you didn't have a light there at that time?

A. I know very well that I did have the light there.

The witness further testified that he doesn't know if the light was burning when Williams, if it was Williams, threw the switch and let the car down on track 21, except that it was burning when

44 he went under the car. He could not see it from under the car; that the point of the switch 21 was perhaps 90 feet from the car under which they were working; that they had but

one blue lantern there; that he lighted the light himself; that Walsh was with him at the time; that neither he nor Walsh filled the lantern that night; that there was no one special to keep the lantern in shape; that whoever used them saw if there was oil in them; that he cleaned it that night to be sure that it was clean; that the first thing you do when you get hold of a lantern is to see that it is clean; that the lantern was all right; that he cleaned the globe with a piece of waste; that he could not tell when he last filled it; that cars for points near New York and New London were sometimes put on the repair tracks, upon either 21-23-25; they were used for local cars and sometimes you would see cars without any bills there; so that cars came in there at any time; that while he was under the car he saw and spoke to Kilpatrick who was passing by, going east.

On redirect examination the witness testified that he had a rule book which was given him and which contained certain rules which were supposed to govern his conduct on the road and that that book contained rule 26 which it was admitted was a rule in force by the defendant company. Rule 26 which was put in evidence was as follows:

"A blue flag by day and a blue light by night, displayed at one or both ends of an engine, car, or train, indicates that workmen are under or about it. When thus protected it must not be coupled to or moved. Workmen will display the blue signals and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track so as to obstruct the view of the blue signals without first notifying the workmen."

The witness further testified that he had never been told to notify Hoban that he was going to work under the cars on tracks 21-23-25 in addition to putting the blue lantern there; that he had not been told to notify anyone.

Q. When you got the lantern that night to light it did you ascertain whether there was oil in it—did you ask?

A. Sure thing.

Q. Was there oil in it?

—. Yes, there was oil.

The witness further testified that they could see this light for some distance. He would not say clear across the yard; that he saw it when he was going down from the shanty.

Q. When you kneeled down to go under that car—before you kneeled down to go under that car, did you see the blue light.

A. Yes I am positive of it.

Q. Burning bright?

A. All right.

The witness further testified that the blue light was at one end and that he was at the other end, about 36 feet or thereabouts from the light; that the car on which he was working was supposed to be loaded; that the car was sealed on both sides; that it was very extraordinary to have empty cars sealed.

On re-cross examination the witness testified that only one car

came down on to the car under which they were working; that he did not notice the switch for 21 and does not know whether it was open or closed; that he put the blue light on the sill of the car; that he did not put it on the ground; that he did not take a blue light when he went to inspect the train because he did not need it; that there was nothing between switch 21 and his car so that from that switch there was a clear unobstructed view of the blue light.

ALBERT W. MARTIN, a witness called on behalf of the plaintiff testified that he was the superintendent of the Boston division of the New York, New Haven & Hartford Railroad Company and had held that position for about one and one half years and before that time was assistant general superintendent of the New
46 York, New Haven & Hartford Railroad Company and had been connected with the defendant company about forty years. The witness was shown a book of rules which it was admitted was the book of rules of the defendant company. He testified that the Boston division of the railroad extended as far as Readville on the Shore Line.

At this point defendant's counsel said: "I object on the ground I stated to your Honor, and would like my exceptions saved to this line of inquiry."

From Readville to New London was the Midland division, and that both divisions were operated by Mr. Byrnes, Vice President.

The witness further testified that car records showing where the cars were picked up were in the possession of Mr. Arthur F. Currier, who had his office at New Haven. These records are known as conductor's wheel records and contain the number of the cars in the train, the initials that are printed on the car, where taken on and where left and the whole record of the car; that in the witness' judgment if Mr. Byrnes asked for those records he would get them; that there would not be the same delay if he asked for them as if the witness asked for them.

MARY AGNES WALSH, a witness called by the plaintiff testified that she lived at present in New London, Connecticut and that she was born in Ireland and had lived in this country 15 years; that she was the widow of Daniel Joseph Walsh, administratrix of his estate and the plaintiff in this action; that they were married June 8, 1904; that the deceased was born in Ireland and so far as she knew he had never taken out naturalization papers up to the time of his death and that he never voted or exercised any rights of citizenship that she knew of; that at the time of his death her husband was 31 years of age.

Q. Will you describe as far as you can to the jury,—I might ask this Mr. Walsh, stand up,—do you recognize your husband's brother was he something the same size as that Mr. Walsh?
47 A. Yes.

Mr. HALL: I object to that.

Mr. SALTONSTALL: I am going to show the value, get the measure of damage.

Mr. HALL: I object to that line of inquiry.

COURT: Gentlemen, you are not making this record very intelligible. I don't want to exclude such testimony as this, you can show the state of health and the likelihood of a long life,—show how long he was likely to live, how long he had lived and his chances of living.

Mr. HALL: I want to object to this line of inquiry.

COURT: I won't rule as to this until the testimony is complete.

Q. What was his weight, if you know about that?

Mr. HALL: I suppose that is asked for the purpose of computing damages.

COURT: I certainly should be inclined to exclude the mere item of weight. I suppose that this goes to show the general condition of health and age, and things that go to make up what a man's life is worth.

Mr. HALL: For what purpose could it be offered other than on the question of damages?

Mr. SALTONSTALL: I am going to offer the value of a man thirty-one years old, earning $17.70 a week and in good general health. I am going to show this further by annuity tables.

COURT: You may show the age, health, and I think you may include the weight. It is a question of probative evidence.

Mr. HALL: My exception to that testimony and such testimony as bearing upon the weight of damages.

48 Mr. SALTONSTALL: I understand that my brother objects to this to protect his ultimate object that annuity tables are not admissible.

Mr. HALL: No, Sir, it is not.

Mr. SALTONSTALL: I should like to have it stated.

Mr. HALL: I will state it if the court desires it.

Conference at the Bench between Court and Counsel.

Q. About what was your husband's weight if you know?

Mr. HALL: I object and ask that my exception be saved.

COURT: All your rights saved.

A. Something about one hundred and seventy pounds.

Q. About one hundred and seventy pounds?

A. Yes.

Q. About how high would you say he was,—how tall?

A. I guess as tall as my brother in law.

Q. About five feet, ten?

A. Yes.

Q. No,—about five feet eight?

A. Yes.

Q. How long, if you know, had your husband been working for the railroad?

A. About four years.

Q. During those four years that you knew that he was working for the railroad, how much, if at all, had he been absent, if at all?

Mr. HALL: Subject to my exception.

A. He had never been.

The witness further testified that she had three children, James Edward, four years, Daniel Joseph, two years, William Patrick one year and her children were dependent upon her husband for support. The plaintiff then offered in evidence the Probate record duly authenticated showing the plaintiff's appointment in Connecticut as administratrix of her husband's estate on the 8th day of June, 1909, which record was admitted in evidence marked
49 Exhibit (1). The plaintiff also offered in evidence a record showing the appointment of the plaintiff as administratrix of the estate of Daniel Joseph Walsh in the Probate Court in the County of Suffolk and Commonwealth of Massachusetts on the 15th day of July, 1909, which was admitted in evidence and marked Exhibit (2).

On Cross examination the witness testified that the deecased had been in this country nine years at the time of his death; that for the last two years of his life they had lived in Midway. Before that time they had lived in New London; that the deceased never spoke of going back to Ireland. He intended to make this country his home and she expected to do the same thing and their home was to be in New London and was in New London at the time of the accident, but she was in Ireland at the time he was killed; that after her husband's death she collected his insurance which he had on his life with the Prudential Insurance Company; the Hibernians and the Travelers Insurance Company; that she was present when her husband was examined by a Doctor for one of these policies; that the examination was in her own house September 4 years ago; that the Doctor was Dr. Beckwith, who is now dead.

Q. Mrs. Walsh, when Dr. Beckwith, who is now dead, was examining your husband for insurance do you know what insurance was afterwards taken out by your husband in consequence of that examination?

Mr. HALL: That I object to.

A. Travelers.

COURT: Yes or No.

Q. Do you know what company he was examined for?

A. Yes.

Q. Now I ask what company it was?

A. Travelers.

Mr. HALL: Subject to my exception.

Q. Travelers?

A. Yes.

Q. Did you afterward collect insurance from the Travelers Insurance Company?

50 Mr. HALL: That I object to.

COURT: I admit it subject to your exception.

Q. Did you after his death collect from the Traveler- Insurance Company?

A. Yes, sir.

WALTER CHANNING WRIGHT, a witness called by the plaintiff testified that he was a consulting actuary and made all kinds of computations which life insurance companies required to use; that he made computations for life, accident and annuity companies; that he had been actuary for the New England Mutual Life Insurance Company for 34 years; that he was an authority on various tables of annuity; that he had constructed the tables for finding annuities of two lives for the Massachusetts Hospital Life Insurance Company; that he is familiar with the method of computing annuities so that he is able to say the exact price of an annuity.

In computing annuities they begin with the table of mortality which shows the length or expentency of life and to compute monetary value of an annuity they have to assume that they have the money at interest and may assume that it is at 3, 4 or 5%.

Q. Assuming that you have a man engaged in the occupation of car inspector; assuming that he works nights around cars in a freight yard; assume that he has been examined and passed by some form of insurance company within four years of the date in question; assuming that he is getting $17.70 a week for seven days in the week; assuming that he was a man about five feet, somewhere five feet eight to five feet ten in height, weighing about one hundred and seventy pounds; was not addicted to the excessive use of alcohol, and as far as we know had no other immoral or bad habit, and assuming in addition to the things that we have asked you to
51 that he was thirty-one years of age,—what, in your opinion, would be a fair value for an annuity on that man's life so that it would give to his widow and children the same income that he was earning?

Mr. HALL: That I object to.

COURT: To what?

Mr. HALL: He has said for one thing that he was examined and passed by an insurance company.

COURT: I ask you to see if there is any other element that should be added and point it out to Mr. Saltonstall.

Mr. HALL: I want it to go on the record that I object to that question because it is incompetent, immaterial, and for the same reason already stated that it goes to prove that which I don't believe any statute provides a remedy for, and in the third place that it contains assumptions which are not warranted by the evidence. Now, what do I understand your Honor asked me?

COURT: You say that it calls for assumptions which do not exist.

Mr. HALL: Which the evidence does not warrant.

COURT: I ask you to point out what assumptions you object to, what other assumptions, if any, you say should be omitted.

Mr. HALL: Does your Honor think I ought to?

COURT: I give you the privilege, if you want to.

Mr. HALL: I do not believe it is the proper way to estimate dam-

ages. I am perfectly willing to say what I think is warranted by the evidence.

Mr. SALTONSTALL: I have stated that he was not addicted to alcoholic or immoral habits.

Mr. HALL: I do not think it is warranted by the previous
52 evidence.

Mr. SALTONSTALL: You can show his habit as to drinking.

Mr. HALL: One thing I pointed out,—you say he was examined and afterwards passed by an insurance company.

COURT: Well——

Q. In putting the question will you assume he was examined, leave out the word "passed" and that insurance was afterwards given him.

Mr. HALL: And that also the evidence does not warrant.

Mr. HALL: I wish it further noted that the circumstances of the plaintiff's intestate's life have not been pointed out to him, and it does not appear that the policy is for a man engaged in the duties of car inspector, nor the rate of reduction that goes for that class of employment. That all goes to my objection to the answer.

Q. And are you familiar in a general way with the duties of car inspector?

A. Only in a general way.

Q. Well, then I ask you to assume that he was engaged in the duties of car inspector where he inspected cars as they were brought into the railroad yard which involved the necessity of getting underneath the cars for the purpose of making repairs, to work in and around cars and locomotives, and do such work as he might be called upon to do in connection with the inspection of freight trains or other trains. Now, I ask you what is a fair value for an annuity for such a man's life as to give an annuity of the value of $17.70 a week.

Mr. HALL: That I object to for the reason I have already stated.

53 COURT: Note your exception. It is admitted.

Q. I want to change that, if I may, what is the fair value of an annuity on a man's life, the man being thirty-one years of age and earing $17.70 a week——

Mr. HALL: For seven days.

Q. (Cont'd.) Seven days.

Mr. HALL: I object. It clearly does not describe the plaintiff's intestate as he should be described. It doesn't mean anything it seems to me. He desires now the value of an annuity without describing the man's occupation, without describing the circumstances. I want my objection to the previous question noted to this, without taking the time of the Court to state it.

COURT: Please state it and get it on the record.

Mr. SALTONSTALL: I do not think this is proper after the question has been withdrawn. He cannot object to stating it again. That is an objection to another question, and if your Honor does not object I ask that he state his objection to this question.

COURT: Please state, Mr. Hall, exactly what your objection is.

Mr. HALL: In the first place I think the question is immaterial, incompetent and improper. I think it has no bearing upon showing the probable length of time which Mr. Walsh would have lived under ordinary circumstances. I think that the question goes to show or tends to show an element of damage which I believe under the statute was not intended to be shown. The statute does not provide for the recovery of any damage such as your Honor is permitting to be shown in this case. To get an insurance expert opinion to show the probable length of time the plaintiff's intestate would have lived, or show what an annuity is worth, I think
54 that further facts should be given to the witness in order that he may form an intelligent opinion. Those are all the reasons that now occur to me. There may be others. I think your Honor should insist on this going in in the proper way. I do not believe in this case such a question should be permitted under such circumstances. I want to incorporate in my objections my objection to all of this testimony at this time.

COURT: Note the exception and he may answer.

A. Between sixteen and seventeen thousand dollars.

Q. If in purchasing an annuity from the various companies issuing them is a difference made in the price of an annuity to a man engaged in what is called a hazardous occupation like that of car inspector than to a man engaged in such a business as farming. Is there any difference in the price of an annuity to the two?

Mr. HALL: This is subject to by general objection.

A. I don't know of any such case.

Q. So that if I, as a railroad inspector, were to attempt to purchase an annuity, I would have to pay the same for it as I would if I went as a farmer to buy the same?

Mr. HALL: I object to that for two reasons because it is immaterial and leading.

Mr. SALTONSTALL: I withdraw the whole question.

Q. What is the average life expentancy, according to the annuity tables of a man at the age of thirty-one years of age?

Mr. HALL: I object to that for the reasons already stated to the admission of this testimony.

COURT: Note the exception and answer.

A. That will vary according to the different tables of mortality.

Q. Will you tell the Jury some of the principal mortality
55 tables now in use in determining the value of an annuity, mentioning the name of the various tables?

A. The Healthy District, The British Office Life Annuity tables, with offices in England and Wales, those are the English tables, all English tables and there are the French tables and the tables which have no special name prepared by different actuaries in this country.

Q. And the Carlyle and Northhampton Tables?

A. They are not in use in this country at the present time.

Q. Have you at my request figures out the exact value of an annuity reckoning interest at the rate of 4%, on the life of a man at

thirty-one. Have you there the exact value of that annuity under all those tables?

A. Under five.

Q. Under five tables?

A. Yes.

Q. And whether in your opinion they are the principal tables now in use?

A. For insurance purposes the Healthy District is believed to be.

Q. And without bothering to give all five will you state the maximum and minimum of the five tables which you have worked out?

Mr HALL: Subject to my objection.

COURT: Note the exception and answer.

A. Northampton, $13,929; Healthy District, $19,060.

Q. As long as the maximum is Healthy District, it might be well, subject to the exception of Mr. Hall, to give us all five. Will you give the five in order stating the name of the company and amount of it.

Mr. HALL: Subject to my objection.

COURT: Note the exception and answer.

56 A. Northampton $13,928, Carlyle $15,827, American $16,222, Fraternal Congress, $17,852; Healthy District $19,060.

Q. Have you any tables showing the expectancy of life of a railroad employee?

A. Not with me.

Q. Is there any such table?

A. Not for exactly that purpose, not within my knowledge.

Q. I omitted to ask you,—I have asked you the value of annuities under five tables, have you with you the expectancy of life under the five tables as well?

A. No, sir.

Q. What would be the average expectancy of life under those five tables, if you know?

Mr. HALL: I object for the various reasons I have stated in my previous objections to this line of inquiry.

COURT: Note the exception and answer.

A. The average expectancy of life for the age of thirty-one for a male is about thirty-four or thirty-five years.

Q. You figure, as I understand it, all of those policies at the rate of 4%?

A. Yes, Sir.

Q. As the rate of interest decreases does the price of an annuity increase or decrease?

Mr. HALL: Subject to my objection.

COURT: Note the exception and answer.

A. If a lower rate of interest were assumed it would increase, if a higher rate of interest it would decrease, it works inversely, the lower the rate the higher the price.

Q. The lower the rate the higher the price?

A. The higher the price.

Q. You say you are familiar with the existing price on a life of this sort, on a life of a man thirty-one years of age in the Massachusetts Hospital Life for instance?

A. I am, but I have not the figures at hand.

Mr. SALTONSTALL: That is all.

On cross-examination the witness testified that in esti-
57 mating the value of an annuity he assumes the rate of interest of 4%; that using a rate of interest of 5% the value would be 5 or 10% less; that he used the given standard tables, well known and used in this country; that the hazardous occupation of a man has something to do with the duration of the years he is likely to live, in his opinion; that he is familiar with the methods of life insurance companies and knows that a man's occupation as car inspector might have something to do with getting life insurance; that the premium would not be double; that there might possibly be an extra charge of from two to three dollars per thousand; that the occupation is somewhat hazardous; that he would regard coal mining or being fireman or engineer on a steam engine more hazardous than being a car inspector; that the Prudential Life Insurance Company would ask a premium of $32.31 per thousand on a man engaged in a hazardous occupation for life insurance. The ordinary rate for a man not engaged in a hazardous occupation would be $19.62 or a difference substantially of $13; that an annuity is not less expensive the more hazardous the life which the applicant leads; that the question of health has nothing to do with the value of an annuity, nor the hazard. All annuities are fixed to include a great variety of occupations and might possibly include extra hazardous occupations; that when a man goes to an insurance company and asks for an annuity, the insurance company does not consider his occupation in life; that he knows that the insurance — have never taken into consideration the occupation as bearing upon the expectancy of life of railroad trainmen or car inspectors, and that Mr. Walsh's position as car inspector would have no bearing upon the determination of the price of the an-
nuity; that the rate of annuities would be all the more
58 readily given to railroad men engaged in an extra hazardous occupation because more benefit would accrue to the insurance company; because the less chance of life the more profit; that the value of an annuity as distinguished from its price of a man engaged in an extra hazardous occupation, would be somewhat less, assuming that he would always remain in the same occupation; that it may be that an annuity had been issued to a man engaged as a car inspector in active service, but he had no knowledge of it; that he does not know definitely what the average expectancy of life of a railroad trainman is and he knows of no figures or tables showing them; that he had not looked into the cost of accident insurance for railroad man and had not gone into the figures on the expectancy of life of a man engaged in a hazardous occupation and had not made any attempt to find out the expectancy of life,

and could not give the value of an annuity of a man engaged in such occupation as Mr. Walsh.

59 MICHAEL JOSEPH WALSH, a witness called by the plaintiff, testified that he lived in Connecticut; was a brother of the deceased; that he was now a car inspector and worked for the New York, New Haven & Hartford Railroad Company, and as such his wages were $17.70 per week and that his brother received $17.70 per week.

Q. Was your brother a man who used liquor to excess?

Mr. HALL: That I object to on account of the reasons already stated, as being immaterial for the question of damages.
COURT: Note the exception and answer.

A. Not to my knowledge.
Q. Was your brother immoral in his habits?

Mr. HALL: And to this line of inquiry.
COURT: Note the exception.

A. Not that I know of.
Q. Do you now work in the Midway Yard, so called, of the New York, New Haven & Hartford Railroad Company?
A. Yes.
Q. Have you seen Mr. Williams, Mr. Hoban and Mr. Lidbury working there from time to time, Mr. Walsh?
A. Well at times I have seen them working.
Q. And when you have seen them working what have they been doing?
A. They have been braking.
Q. Braking?
A. Yes.
Q. On what railroad?
A. The New York, New Haven & Hartford.

Mr. HALL: Wait a second, I object to this.
COURT: On what ground?
Mr. HALL: It is not competent for him to show on what railroad they were working I think to maintain my position on the question of jurisdiction——
COURT: I admit it. Save your exception.

Q. Have you seen men working doing what they called, what is called by the workmen in the Yard Switching in Midland from time to time?
A. Yes.

60 Q. Described what the conductor of the switching engine does; what the switching engine does; what the process of switching is. Tell what the men do who are engaged in switching, and tell what the conductor of the switching engine does, Mr. Walsh?

A. In the first place he has to give them men orders. He gives them orders. He has one man to throw the switches. The con-

ductor gives this man orders to throw the switches. He has another to pull the pins,——

Q. Mr. Walsh I have asked you in some words to explain just what is meant by the word switching, what the men do and what the conductor does, if you will finish out the answer. He has, you say one man to throw the switches and another man to pull the pins. Does he do anything besides. Whether or not he calls out the track indicating the number of track that such particular car is to go upon?

A. He does.

Q. Will you state what your brother's health was, what was the condition of his health at the time he died, if you know?

Mr. HALL: Subject to my exception.

A. I suppose that I know. I never knew him to be sick one day in his life.

Q. Did he ever have a bad illness?

Mr. HALL: Subject to my exception.

A. Not that I know of.

On cross examination the witness testified:

Q. Mr. Saltonstall has asked you about the habits of your brother, what do you know about his habits from observation, Mr. Walsh?

A. I boarded——

Q. What do you know about his habits? Mr. Saltonstall asked you about his habits of drink, what was it you said?

A. His habits were pretty temperate as far as I know.

Q. I understood you to say that he never drank at all or words to that effect?

60*a* A. I didn't say so. I made a mistake if I did.

Q. What do you say that he drank or didn't?

A. I never saw him under the influence of liquor, a man that was never drunk.

Q. What I mean is, did he use alcoholic liquors or not?

A. To a certain extent.

Q. Not a total abstainer?

A. No.

Q. He wasn't a man that was in the habit of getting drunk if that is what you mean?

A. I mean I never saw him under the influence of intoxicating liquor.

The witness further testified that he had been working as a car inspector in the Midway Yard for 18 months and before that time had been a water tender in the boiler room for the Navigation Company. Before that had been a section man on the railroad; that cars have to be taken from the train and placed on different tracks in the yard and classified and taken from the tracks and made up into trains, and the conductor is there with a gang of three or four men to separate the cars from the train and put them on different tracks; that different men of the switching crew threw the switches;

that they threw them according to his orders; that he doesn't know what different kind of cars were put in track 21; that each track has a switch and that the man who is to throw the switch has an opportunity to see the track ahead before throwing the switch; that he has seen the men throw the switch on a track that was obstructed; that he had worked at night on the tracks repairing cars; some times he told the conductor and sometimes he didn't tell anybody; the conductor he told was Mr. Lidbury, Mr. Hoban was not a conductor at the time he worked in the yard at night; that he told him just to be telling that he told Lidbury to see that they did not put more trains on a certain track; that was the thing he
61 told them for; the reason was so that they would not take a car down on him; that he boarded in the same house with his brother.

On re-direct examination the witness testified that he never received any instructions from anybody to notify anyone or to give any other notice that he was going under a car than to place a blue flag by day or a blue light by night.

On re-cross examination the witness testified that the instructions he received was to put the blue signal at night when working underneath the cars on tracks 21-23-25; that he received those instructions from the foreman W. F. Needham; that he didn't remember him telling him anything else.

PATRICK J. KEATING being recalled testified that the engine doing the switching had the initials N. Y., N. H. & H. or the initials of the railroad painted on it; that to the best he can remember the initials N. Y., N. H. & H. R. R. were painted on the engine; that he thinks those letters were painted on the car.

LUCIAN M. SHEFFIELD a witness called by the plaintiff testified that he was an assistant foreman on the New York, New Haven & Hartford Railroad; that he cannot say that he had ever seen any engine in the yard with the initials other than N. Y., N. H. & H. painted on it.

On cross examination the witness testified that he was assistant foreman of the inspectors; that it is a frequent occurrence to repair "cut outs" on track 21 at night.

The defendant admitted that box car N. Y. N. H. & H., 85070 was picked up outside of Connecticut and was taken out at Midway for repairs; that it was loaded with perishable freight brought from outside the State of Connecticut. The defendant further admitted that there is a New York, New Haven & Hartford Railroad Company in Massachusetts and a New York, New Haven & Hartford Railroad Company in Connecticut and that the President,
62 Vice President and Treasurer of both are identical. The plaintiff offered in evidence the following statutes, copies of which are annexed hereto.

Acts of Massachusetts 1839, c. 101 which is entitled, "An Act to Incorporate the Hartford & Springfield Railroad Corporation."

Acts of Massachusetts 1844, c. 28 which is entitled, "An Act in

Addition to an Act to Incorporate the Hartford & Springfield Rail-road Corporation."

Acts of Massachusetts 1847, c. 244 which is entitled, "An Act in addition to An Act to incorporate the Hartford and Springfield Rail-road Corporation."

Acts of Massachusetts 1872, c. 171 which is entitled, "An Act to authorize the Hartford & New Haven Railroad Company to consolidate with the New York and New Haven Railroad Company."

Acts of Connecticut 1871, c. 129 which is entitled, "An Act in Addition to an Act entitled an Act concerning communities and Corporations."

Acts and Resolves of Rhode Island, January 18, 1892 passed April 26, 1892.

Acts and Resolves of Rhode Island of 1893 passed January — 1893, incorporating the New York, New Haven & Hartford Rail-road Company as a corporation of that State.

It was also put in evidence as a fact that at a directors' meeting on July 24, 1872 of the directors of the New York & New Haven Railroad and the directors of the Hartford & New Haven Railroad, the Acts of Massachusetts 1872 c. 171 and Connecticut 1771, c. 129 were accepted and all formalities were subsequently complied with.

The plaintiff also offered the defendant's rule book on the first page of which appears: "Rules of the New York, New Haven &
Hartford Railroad for the government of the operating de-
63 partment. The rules herein set forth govern the railroads operated by the New York, New Haven & Hartford Railroad Company. They take effect June 1, 1907, superceding all previous rules and instructions inconsistent therewith."

It was also admitted as a fact that in 1892 and 1893 the New York, New Haven & Hartford Railroad was authorized by the legislatures of Connecticut and Rhode Island to take a lease of and hold the railroad franchise and property of the New York, Providence & Boston Railroad extending from Providence to New London, and did lease and acquire the same without authority being given in Massachusetts additional to the Charter of 1844 and 1872.

The following rules from the above rule book were put in evidence:

820. Yard Masters report to and receive instructions from the Superintendent. They must obey the orders of the Agent or Station Master in matters pertaining to station work.

823. They will be responsible for the proper distribution and placing of cars in the yard limit and for the prompt movement of the cars in and through the yard.

824. They must be familiar with the rules for movement of trains and for the government of employés in train and yard service, and must require the prompt and efficient discharge of duty by all employés subject to their direction.

830. They must see that yards are kept in good order; that opportunity is given for the proper inspection of cars; that such inspections are made and that cars requiring repairs are promptly placed or sent to the shop as the case may require.

831. They must see that cars to be transferred are promptly placed and avoid all unnecessary delay to such freight.

836. Yard Conductors report to and receive instructions from Superintendent. They must obey the orders of the Yard Master, Agent or Station Master in matters pertaining to their work.

64 838. They will observe the Rules for Conductors, Yard-masters and other employés so far as they relate to the proper discharge of their duties.

850. Switch tenders report to and receive instructions from the Superintendent. At stations or yards they will obey the instructions of Station Master, Station Agent or Yard Master.

852. When assigned to the charge of switches they will be responsible for their safe working, and at all times they will be watchful, careful and closely attentive to duty; seek to prevent accident, either from neglect to display danger signals, failure to throw switches properly, leaving them unlocked, setting them for the wrong track, or unfastening switch while train is passing.

853. They must be thoroughly familiar with all signal rules, the arrangement of tracks where switching is required, and the movement and rights of trains using them. They will be constantly on the watch for approaching trains, and be sure that the proper signal is shown to each. Night signals must be lighted one hour before sunset and extinguished soon after sunrise.

854. They will examine thoroughly the switches to be operated and see by actual trial that they are in complete working order, including all connections, targets, lamps and other signals. They will inspect the condition of the frogs, rails and crossings, and quickly remove ice and snow, or any other obstruction to the safe passage of trains. They will make temporarily such minor repairs as may be needed, but report at once to the proper officer all defects, breakage or difficulty in operation, and see that signals are used as required by the rules.

65 The plaintiff offered a copy of a notice which was sent by registered mail to Mr. C. S. Mellen, and a receipt, for which signed by him which was received by the plaintiff's attorney, and also a copy of a notice with the return of a Deputy Sheriff showing service upon T. W. Hoogs, secretary of T. E. Byrnes, Vice President. These were respectively marked plaintiff's Exhibits 3 and 4. They were excluded by the court and the plaintiff duly excepted. At the close of the plaintiff's evidence the court, upon motion of the defendant ordered a verdict for the defendant on the 7th and 8th counts of the plaintiff's declaration, to which ruling of the court the plaintiff duly excepted and its exceptions were saved.

66 LUCIAN M. SHEFFIELD, a witness called by the defendant testified as follows: That at the time the deceased was killed he was foreman of the car inspectors at the Midway Yard. Before that time he was engaged in the capacity of car inspector at Midway nearly five years; that he worked at nights altogether; that if practicable, car inspectors warned the train men that they

were going underneath the car in addition to placing the blue light; that by practicable he meant that they did this when they did not have to go too far to warn the switching crew; that when the conductor and men on the track were near they warned them; that he notified the men to use their blue lights; that the deceased had worked under him a year or more and he had given him as well as others instructions as to the manner of doing their work; that he instructed them to protect themselves; that he told them to always put up the blue light and to notify the car crew as much as possible; that he was on duty the night the deceased was killed and was notified of the accident by Mr. Keating; that he at once went over to track 21 and found two cars on that track about 100 feet or more apart; that the lantern was picked up and handed to him. It was on the east side of the car, that is the Boston end. He saw no dents on the lantern; the globe was not broken and it was not lighted, the lantern was out. The distance between one switch and another was 200 to 240 feet.

On cross-examination the witness testified that when Mr. Keating told him of the accident he was working on the farthest side of the main line from where the accident occurred. As he approached track 21 he saw two box cars about 100 feet apart; the lantern was picked up at the east end of the car, which would be the end nearest the switch; which would be the end he would naturally put the blue light on; that nothing could approach the car from
67 & 68 the west; that tracks 21-23-25 were called repair tracks and also stowaway tracks. On that side of the yard nothing excepting hot boxes or minor repairs were ever repaired on any tracks other than 21-23 and 25; that no car is laid up for repairs at night on any track excepting 21-23 or 25, and any man who has had any experience at all in the yard ought to know that. The lantern was a regular brakeman's lantern; kind of a cage with a globe inside; that the cage is a protection which would save the globe from being broken if the lantern fell unless it struck on a sharp point; that when the lantern was picked up it was apparently in good order and had oil in it;

Q. Now, there is on box cars, on some box cars a sill, I don't know the technical name of it?

A. There is something that you might call a sill.

Q. Supposing on such a car as that, with a sill which extends eight or nine inches, a fair estimate?

A. Yes.

Q. Supposing on such a car sill, extending eight or nine inches a lantern was placed, put on the side of the sill that projected about eight inches from the bunter. Suppose another car came against the bunter, the bunter saves the car from getting the impact of the other car, now there would be nothing on either car which would strike against or come into contact with that lantern would there?

A. No, sir.

Q. And it is quite common in your experience for lanterns which fall from cars to go out because of the fall?

A. Yes.

Q. Is that the lantern?
A. I couldn't tell whether that was the one or not. It was one like that.

COURT: Do you object to the lantern being marked?
Lantern marked Exhibit "B" for identification.

Q. It was a lantern similar to that?
A. Yes.
Q. You have frequently known such a lantern as that, Mr. Sheffield, to fall from the car without breaking the glass, have you not?

Mr. HALL: That I object to.

Q. You have frequently known lanterns to be thrown by the impact of one car hitting another without breaking the globe of the lantern?
A. I have never seen very many fall from the car.
Q. This fall, you think was sufficient to have put the light out?
A. I have seen brakemen when they wanted to put out a light shake it, but I don't know as I ever saw a blue light falling from a car.

69 that the car which came down and struck the one under which the deceased was working was an ordinary N. Y., N. H. & H. box car, one of the Keith built cars, about 34 feet long painted red and had N. Y., N. H. & H. painted on it.

OSCAR W. PALMER, a witness called by the defendant testified as follows: That on February 11, 1909, he was assistant yard master; that his office was near the east tower which was distant from track 21 all the length of the east yard, the main line and the west yard, a distance of 50 or 60 car lengths; that his duties were those of night yard master; that his jurisdiction extended over both yards; that tracks 21, 23, 25 were used to repair cars; for cars without bills and for local cars going west and cars that were held for orders; that they were not used exclusively for repair purposes; that from what he had seen it was a rare occurrence for cars to be repaired on those tracks; repairing was done on other tracks as well as on 21, 23 and 25; that the latter two tracks were used the most for repairing; that 23 and 25 were short tracks holding seven cars;
70 21 held sixteen or seventeen cars; that the number of the car under which Mr. Walsh was was 85075; that he could not swear to the number; that he took the number at both ends and presumes that is the number; that he does not think there was any wooden end sill on that car; that to the best of his recollection the end sill is a small iron projecting out perhaps two or three inches; that he doesn't think that there is any platform or rest or end sill on those cars other than that; that the car under which Walsh had been working was 8 or 9 car lengths west of the switch; that the other car was a regular N. Y., N. H. & H. box car number 74301; that he thinks this car was coupled to an Erie flat car; that the blue lantern was 3 or 4 car lengths east of the car under which Walsh was killed; that Walsh's tools were found east of the blue lantern,

that is toward Boston; that there was oil in the lantern and it was sitting upright; that there was nothing the matter with the lantern except that it was out.

On cross examination the witness testified that he made out a report and that under question No. 14, "Was the injured person at fault, if so how?" he filled in the words, "don't know;" that he had also written on the report "I went to the west yard and found him lying near 85075 between tracks No. 19 and 21 with a broken car inspector's lantern lying side of him;" that he didn't save the car inspector's lantern.

During the cross examination of this witness it was admitted that the car referred to in his report also came from without the state. The report was marked Exhibit C, which was read in full to the jury.

ARTHUR M. KILPATRICK, a witness called by the defendant testified that he was a yard clerk at Midway; that he went by the rear or west end of the car; that he did not see a blue light when he went by and spoke to them.

71 On cross examination the witness testified that they do some repairs on tracks 21-23 and 25; that he never saw them do repairs under cars on other tracks; that he never saw men working under cars except on those tracks and that if when he walked by the car the lantern had been on the east end of the car on the sill of the car he could not have seen it.

On re-direct examination the witness testified that he didn't think there was any distinction between tracks 21-23 or 25 as to which was most used for repairs or for the starting of local cars.

JAMES J. HOBAN, a witness called by the defendant testified as follows: that he was now a brakeman in the west yard at New London; that at the time Mr. Walsh was killed he was conductor of the switching crew in the west yard and had been conductor at that time for about 18 months; that on the night in question the switching crew started in working at 7 o'clock; that they went to supper as near as he could judge at quarter of three A. M. and they were at supper for about an hour. They then went to work first on track 17. The first thing they did was to shift the cars down track 17 to make room for more cars. When the next train came in he started to switch the cars on to the different tracks where they belong; that he saw Walsh and Keating while he was working on that train and spoke to them; that neither Walsh or Keating told him they were working or were going to work on a car on track 21 and he did not know they were working under a car on track 21; that he turned some switches and one of the other men turned some; that one man of the crew threw the switch, one man pulled the pins and another man worked out in the field to see that the cars were coupled; that they put some of the cars that came in on that last train on track 17, some on 19 and some on 21; that he put some of the cars

72 on 21 before he saw Walsh and Keating and some afterwards; that he saw them between tracks 11 and 13; they were then

walking towards the shanty; that this train that came in after supper they called the M. U. and it came in on track 29; that he did not at any time see a blue light on track 21; that it was an unusual thing to repair on track 21 because it was something that they didn't do very often except for some minor repairing; that he saw a blue lantern in some one's hands after the accident; that he didn't find any dents or marks; the glass was not broken; it was not lighted. The ground was frozen hard, it was a frosty night, moonlight, pretty cold and a light wind; that the end sill of the car under which the deceased was working was a sort of steel frame not over 3 or 4 inches wide.

On cross examination the witness testified that he remained a conductor for about 3 months after this accident; that he is now a brakeman and his wages are $25 per week. This M. U. train was a freight train.

Q. Where did it come from and where did it go to?

Mr. HALL: That I object to.

COURT: Note the exception and answer.

Q. Do you know where M. U. one came from?
A. I don't know the point. It came from down east.
Q. Do you know how far down East?
A. I do not.

The witness further testified that tracks 21-23 and 25 were not known as repair tracks; he would call them short tracks in the Midway; that he had seen them repair on other tracks than 21, on 17 and on others.

The witness's report marked Exhibit D. was read. In answer to the question, "What was the cause which led to the accident?" he said, "New Haven, 74301 (meaning N. Y., N. H. & H. R. R.) switched into New Haven box car 85075." Under the heading remarks, he reported "about 4 A. M. I had hold of four cars,
73 cut off one car and kicked it on to track 21, striking New Haven car No. 85075. New Haven 85075 was in on No. 21 about 8 car lengths to clear. Walsh was working on this car and must have been going down and under the car. The brakeman, Williams, threw the switch leading to track 21 and he claims that he did not see a blue light. I stood between No. 11 and 13 and could not have seen the blue light if one had been there. Blue light was found on the ground, but was not lit bent and globe was not broke. Blue light was taken by car inspector, Sheffield. Car inspectors, Walsh and Keating passed ten minutes before the accident and said nothing about going to work on car. As a rule they do not repair cars in the night.

J. J. HOBAN."

This was offered and admitted in evidence. The witness further testified that if there had been any car coupled on to 74301 he would have mentioned it in his report.

On redirect examination the witness said he did not mean in his report that the light was bent.

GEORGE E. WILLIAMS, a witness called by the defendant testified that he lived in New London, Connecticut and was a brakeman; that he had been working for the New Haven road at Midway for the past four years and before that was a brakeman on the B. & M.; that on the night Mr. Walsh was killed he was working as a switchman, which means a person who switches the cars on the different classification tracks. When he came back from supper about quarter of four in the morning he went on # 9 and got hold of the M. U. one switcher which had pulled in while they were at supper; that after he got the
74 engine from # 9 and switched train M. U. that the work they had to do was to take this M. U. one and switch it around on the different classification tracks; that is, they put cars for different roads, B. P. on 13 and L. V. cars on 15; that the conductor told him to throw the switch for letting the cars in on 17 and then he walked to 19 and that was set red and he walked down to 21 and threw it over for the car to go on 21; that was the track where Walsh was hurt; that he walked from 17 toward 21 and saw the car on track 21; that there was nothing in the way of a car to obstruct his view; that he saw the end of the car; that it was about six car lengths away; that there was no blue light on that car; that he could see the east end; that if there had been a blue light on that car that it was his duty not to let a car in on that track; that he then walked to 17 switch and threw a flat car in on 17 and then some one told him that Walsh had been hurt; that car 85075 was one of a new series of cars with a steel frame and the end sill is nothing more than a projection of the steel frame that came out three or four inches; that he did not know that men were repairing underneath the car; that he saw them going on the lead past him; that it was not a usual thing to repair on track 21 at night.

On cross examination the witness testified that he knew that Walsh and Keating were car inspectors; that they inspected cars that come in on trains to see if there were any defects in them and he knew in addition to that that if there was a defect or if there was anything out of condition and repairs were needed on the cars that the car inspectors did them; that he can't say he has seen a car inspector doing anything outside inspecting cars as they came in and making repairs if repairs were needed; that inspection would be made usually before the train was broken up on the long side track; that the last time he saw Walsh and Keating they
75 were between tracks 11 and 13 walking toward the shanty; that his orders from Hoban were to shift those cars onto 17 and 21; that he did not go nearer to 21 than the 19 switch; it was about 80 feet from track 21; at that time there were no cars on 19, but there was a red light because the track was going to be used for making up P. N. one; that he went down to where Mr. Walsh was killed; that he didn't see the blue light there; that he did not hear that a blue light was picked up; that as soon as it was seen the man was injured somebody wanted a rope to tie up his arm and he went to get it.

On re-direct examination the witness testified that it was his duty to see that track 21 was free so that he could throw cars on it.

BERTRAM E. LIDBURY, a witness called by the defendant, testified that he lived in New London and was a conductor; at the time of the accident he was a member of the crew; that after he heard of the accident he went down to where Walsh was and he did not at that time see the blue light. He did see it afterwards in the Yard Master's office; he did not find any portion of the lantern broken or bent or the globe broken; that he had known of lanterns going out; that a lantern might go out if the wick was crusted over; that on his way from dinner he cut his finger and at the time of the accident he was having it attended to; that he put the car under which Walsh was killed on track 21; that when a car is marked "cut out" they do not know when it is to be repaired; that the practice is for the night inspector to cut out the cars needing repairs and with the exception of hot boxes and minor repairs they are left for the day men to repair.

Q. Was it the practice for men going beneath the cars to notify the car crew?

A. It has been done. It is done now. They do it.

76 Q. Did they inform you that they were going underneath this car?

A. No.

On cross examination the witness testified that he put the car in on track 21; that from the time he left to go to dinner he did no work until after the accident, so that all the time Walsh and Keating were at work he did not see the car at all; that in nearly every case the car inspectors told the crew when they are going underneath the cars, but there have been cases where they have not been told.

The defendant put in evidence the following statutes copies of which are annexed hereto and made a part hereof:

Private Laws of Conn., 1833, Vol. I, Page 1002, being a "Resolve Incorporating the Hartford and New Haven Railroad Company."

Private Laws of Conn., 1835, Vol. I, Page 1006, being a "Resolve Incorporating the Hartford and Springfield Railroad Company." Passed May 1835.

Mass. Special Laws, Vol. 8, Page 116, 1839, chap. 101, being entitled "An Act to Incorporate the Hartford and Springfield Corporation."

Private Laws of Conn., 1840, Vol. 4, Page 917, being an & "Act Concerning The Hartford and Springfield Railroad Corporation incorporated by Massachusetts and Connecticut." Passed 1840.

Special Laws of Mass., 1844, Chap. 28, Passed February 23, 1844, being "An Act in addition to an act to incorporate the Hartford and Springfield Corporation."

Private Laws of Conn., 1844, Vol. 4, Page 901, entitled, "Altering the Charter of the Hartford and New Haven Railroad Company

and changing name to 'The New Haven, Hartford and Springfield Company.'" Passed 1844.

77 Mass. Special Laws, Vol. 8, Page 809, 1847, Chap. 244, entitled, "An Act in addition to an Act to incorporate the Hartford and Springfield Corporation."

Conn. Public Acts of 1871, Chapt. 129, passed July 26, 1871, entitled, "An Act in addition to an Act entitled an Act concerning communities and corporations."

Special Laws of Conn., 1889, Vol. 10, Page 1298, approved June 14, 1889, amending the Charter of the New York, New Haven and Hartford Railroad Company.

R. I. Acts and Resolves, June session, 1832, Page 67, being "An Act to incorporate the New York, Providence and Boston Railroad Company."

Private Laws of Conn., Vol 1, Page 1019, being a "Resolve incorporating the New York and Stonington Railroad Company." Passed May, 1832.

R. I. Acts and Resolves, June Session, 1833, Page 10, entitled, "An Act to unite the New York and Stonington Railroad with the New York, Providence and Boston Railroad."

Private Laws of Conn., Vol. 4, Page 975, entitled, "Incorporating the New London and Stonington Railroad Company." Passed —, 1852.

The conditions required by the terms of the various acts were fulfilled by the railroad and no question upon this point is raised by either side. The defendant also put in evidence the following records:

Records of the Hartford and New Haven Railroad under date of November 7, 1843, of a contract with the Hartford and

77*a* Springfield Railroad of Massachusetts and George Bliss and others.

Records of the Hartford and Springfield Railroad of May 10, 1847.

Records of the Hartford and New Haven Railroad of May 10, 1847.

Certificate filed with the Secretary of State on August 6, 1872, signed by the New York, New Haven and Hartford and New Haven Railroads.

Lease of the New York, Providence & Boston Railroad by the New York, New Haven & Hartford Railroad, April 1, 1892.

It was agreed that the Midway Yard where the accident occurred was upon the line of the New York, Providence & Boston Railroad Company and is in the State of Connecticut and that the Midway Yard was the property of the New York, Providence & Boston Railroad Company at the time it was leased on April 1st, 1892, to the New York, New Haven & Hartford Railroad Company for a term of sixty years.

Records of the New York and New Haven and Hartford and New Haven Railroads showing their action in pursuance of the authority contained in the Conn. Act of 1871 and Mass. Act of 1872.

Records showing the purchase of the New York, and Stonington

Railroad by the New York, Providence & Boston Railroad Company in 1864.

Records of the New York, Providence & Boston Railroad showing the action taken by the company on the 1st day of April, 1892.

The defendant made the same admission without any reservation whatsoever as to car 85075 as had been made in regard to car 85070.

78 The defendant offered the case of William H. Hoxie v. N. Y., N. H. & H. Railroad decided by the Supreme Court of Errors in the State of Connecticut in June 1909, as showing that the Federal Act is unconstitutional according to the laws of Connecticut and also offered the General Statutes of the State of Connecticut, Chap. 37 and chapters amendatory thereto.

79 The plaintiff requested the court to give the following instructions to the jury:

Plaintiff's Requests for Instructions.

1. The defendant is a common carrier by railroad, engaged in commerce among the several states.

2. On the uncontradicted evidence of the case the plaintiff's intestate at the time he was injured was engaged in interstate commerce.

Johnson v. Southern Pacific Railroad Co. 196 U. S. 1.

3. If the jury find that when the plaintiff's intestate and Keating went to work underneath the car, either the plaintiff's intestate or Keating, with the knowledge of the plaintiff's intestate, put out a blue light on the car, the jury are warranted in finding that the plaintiff's intestate was in the exercise of due care.

4. If the jury find that the only rule with reference to giving notice when men were at work about or under cars at night was that a blue light should be displayed, and that no instructions outside of the rules had been given to Keating or to the plaintiff's intestate by any officer or agent of the Railroad Company to give any other warning, then the jury would be warranted in finding the plaintiff's intestate was in the exercise of due care in going to work under the car after he, or Keating, in his presence and to his knowledge, had placed a blue light on the car under which they were at work.

5. If the jury find that the only rule prescribed by the Railroad Company to be observed by men working about or under cars at night was that they should display a blue light, and that such protection was adequate in a yard such as the plaintiff's intestate was working in, and under the conditions under which he was working, then they are warranted in finding negligence of the defendant or of its officers in setting the plaintiff's intestate to work or
80 allowing him to go to work in the place in which he did, under those circumstances.

6. If the jury find that there was a blue light on the car under which Keating and the plaintiff's intestate were at work, then if

any other employee sent, or in the execution of his duties, permitted another car to be moved against the car under which Keating and the plaintiff's intestate were at work, the jury are warranted in finding negligence on the part of the employees of the Railroad Company.

7. Railroad corporations created by concurrent legislation of two or more states, having a joint interest in the operation of the entire line of road extending through or into such several states, are jointly liable for a tort committed in its operations in either state.

Smith v. New York, New Haven & Hartford Railroad Co., 96 Fed. 504;

Boston & Maine Railroad Co. v. Hurd, 108 Fed. 116.

8. The defendant in this case and the New York, New Haven & Hartford Railroad Company of Connecticut are on the evidence railroad corporations created by concurrent legislation, having a joint interest in the operation of the entire line of road extending through or into the states of Massachusetts and Connecticut, and the defendant in this case is liable for a tort committed in the operation of the road in Connecticut, if all the other elements of liability going to show negligence are made out.

9. The measure of damages is compensation for the pecuniary loss sustained by the widow and children of the plaintiff's intestate.

10. In determining the pecuniary loss to the children of the intestate the jury are entitled to consider their loss of care, attention, instruction and training from their father's death.

11. Life or mortuary tables may be used as an aid in determining the probable duration of human life. They do not furnish an absolute rule of computation. Each case must stand on its
81 own conditions. The jury are to determine whether or not the deceased would live out the term of his life expectancy, and in determining this they are to consider his character, habits and morals, his state of health, his care of himself and the occupation in which he was engaged.

12. Annuity tables may be considered by the jury in ascertaining the compensation the plaintiff is entitled to receive for the pecuniary injury done to the widow and children by the death of the intestate; but the jury are also to consider the state of health of the intestate, his age, habits, occupation and the likelihood of his being able to continue to work during the period of the expectancy of life.

MARY AGNES WALSH,
By Her Attorneys, SALTONSTALL, DODGE & CARTER.

82 The defendant requested the court to give the following instructions to the jury:

Requests for Instructions.

1. Upon all the evidence the plaintiff cannot recover.
2. That the court dismiss the cause for want of jurisdiction.
3. That this action arose out of an injury which occurred in the

State of Connecticut upon the line of a railroad company operated under the laws of the State of Connecticut.

4. That the action rose out of an injury which occurred in the State of Connecticut upon the line of a railroad company operated under the laws of said State of Connecticut and over which railroad company this court has no jurisdiction.

5. That the court dismiss this cause for the reason that the plaintiff has no right to maintain its action in this court.

6. That the court dismiss this action for the reason that there is no evidence that would warrant the jury in finding that the cause of action arose upon a line of railway belonging to the defendant.

7. That the court dismiss this action for want of jurisdiction for the reason that if any cause of action exists in favor of the plaintiff, it exists against a corporation existing and operating under the laws of the State of Connecticut and separate and distinct from the defendant railroad company.

8. That the court dismiss this cause for the reason that if it shall be found that any cause of action arose on the line of this defendant, it was upon the line of this defendant while a citizen of the State of Connecticut.

83 9. That the court direct a verdict for the defendant because the Act of Congress upon the provisions of which this alleged cause of action is based is unconstitutional because—

(*a*) Congress has no power under Article I, Section 8 of the United States Constitution to pass this Act;

(*b*) The Act assumes to govern the relations of master and servant as between an interstate carrier and an interstate employee;

(*c*) The Act is not in any sense a regulation of commerce among the several states;

(*d*) The Act provides a remedy only to an injured employee and therefore is in no sense an act to regulate commerce;

(*e*) By the provisions of the Act the defendant would be made liable by reason of the negligence of an intrastate employee;

(*f*) Congress is prohibited by the terms of the Fifth Amendment to the United States Constitution from depriving any person of life, liberty or property without due process of law;

(*g*) The Act violates the true intent of the Fifth Amendment to the United States Constitution;

(*h*) The Act violates the true intent of the Fourteenth Amendment to the United States Constitution;

(*i*) The Act is partial in its operation and not founded on reasonable or just classification;

(*j*) The Act is not limited in its operation to such claims of employees as might rightfully be embraced within its terms;

(*k*) Congress has no power to provide a remedy to an injured employee of an interstate carrier as provided in Section 3 of the Act;

(*l*) It violates the Constitution of the State of Connecticut;

(*m*) That the provisions of the Act violate the provisions of the statutes of the State of Connecticut;

(*n*) That the Act has been held unconstitutional in the State of Connecticut.

10. The plaintiff cannot recover because there is no sufficient provision whereby the damages may be assessed by the jury.

11. The plaintiff cannot recover in this action because Congress cannot create such a right of action in favor of personal representatives of an inhabitant of a state.

84 12. The plaintiff cannot recover because the provisions of the Act are contrary to the law of the State of Connecticut.

13. There is no evidence that would warrant the jury in finding that the defendant was engaged in interstate commerce at the time the plaintiff's intestate was injured.

14. There is no evidence that would warrant the jury in finding that the plaintiff's intestate was employed by the defendant in interstate commerce at the time of his death.

15. There is no sufficient evidence that would warrant the jury in finding that the death of the plaintiff's intestate resulted in whole or in part from the negligence of any officer.

16. There is no sufficient evidence that would warrant the jury in finding that the plaintiff's intestate was injured by reason of the negligence of any of the agents of the defendant.

17. There is no sufficient evidence that would warrant the jury in finding that the plaintiff's intestate was injured by reason of any negligence of any employee of the defendant.

18. There is no evidence that would warrant the jury in finding that the death of the plaintiff's intestate resulted by reason of any defect or insufficiency due to the defendant's negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

19. In order to recover for the negligence of the switchman Williams, the plaintiff must show affirmatively by a fair preponderance of the evidence that at the time that Williams opened the switch to permit cars to go on to 21 the blue light was upon the car and burning so as to apprise Williams of the existence of men beneath the car, or the plaintiff must show by a fair preponderance of the evidence that Williams had some other reason to know that the men were beneath the car.

20. If it shall appear that at the time Williams went to the switch to open the same in the exercise of reasonable care he had no reason to suppose that there were men beneath the car and that at the time no blue light was burning to warn him of

85 their presence, then the jury would not be warranted in finding that Williams was negligent.

21. There is no evidence that would warrant the jury in finding that either Walsh or Keating told Williams that they were intending to work beneath the car.

22. There is no evidence that would warrant the jury in finding that the conductor Hoban knew or had reason to know in the exercise of reasonable care that there were men beneath car #85070 at work.

23. If it shall appear that the plaintiff's intestate had an oppor-

tunity to warn the men of the switching crew that he was intending to work beneath the car under which he was injured and that it was the practice on the part of inspectors to inform the switching crew that they proposed to work beneath the car and that it would have been the exercise of due care on his part to have warned the switching crew if he had an opportunity so to do, then the jury may find that Walsh contributed to the injury and to the extent he contributed they may mitigate the damages, assuming that they find some officer, agent or employee of the defendant negligent.

24. The circumstances and exigencies of working at night in a freight yard where there are many tracks and a constant moving of cars and engines at varying rates of speed require from the men so employed some vigilance to protect themselves from injury.

25. The jury have no right to consider either the value or the price of an annuity which would yield $900 per year in determining the amount of damages to be assessed in this action.

26. The sum of $900 per year does not fairly represent the yearly value of the plaintiff's intestate's life to the plaintiff measured in dollars and cents.

27. Inasmuch as there have not been offered any standard life or annuity tables showing at any age the probable duration of life and the present value of a life annuity based upon the
86 evidence in this case, then there is no evidence that the jury may properly consider as to the compensation which the plaintiff is entitled to recover.

28. That the court dismiss this action because the defendant is not a citizen of Massachusetts, but is a citizen of Connecticut.

29. That the court dismiss this action because if the defendant is a citizen of Massachusetts, the court must also recognize it as a citizen of Connecticut.

30. That the court dismiss this action because if it should be held for the purposes of jurisdiction in this case that the defendant is a citizen of Massachusetts only, yet that the Massachusetts corporation which is made the defendant in this case is not liable to this plaintiff because it could not and did not commit through its agents, servants or employees the act of negligence upon which the plaintiff relies to recover.

87 *Charge.*

DECEMBER 3, 1909.

Mr. Foreman and Gentlemen of the Jury:

Mary Agnes Walsh, who is alleged to be an alien and to be the administratrix of the estate of Daniel Joseph Walsh, brings a suit against the New York, New Haven and Hartford Railroad Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, citizen.

The diversity of the citizenship brings the case within the cognizance of the Federal Court in this Circuit, and the case comes before you to pass upon the facts of the case.

The only allegations are those contained in the second count and they are substantially that, while the plaintiff's intestate was engaged in replacing a draw spring on one of the defendant's cars then in use in such commerce, interstate commerce, commerce between states, or between any territory and state, was injured by the negligence of the officers, agents or employees of said carrier in pushing another car or cars against the car or cars on which the plaintiff's intestate was working; that he died of the injuries so received; that said Daniel Joseph Walsh left surviving him Mary Agnes, his widow, and also James Edward, aged four years, Daniel Joseph, aged two years and William Patrick, aged four months, his only heirs and next of kin, which widow and children were dependent upon him for support, and that said action is brought by the plaintiff for the benefit of the surviving widow and children, and prays judgment in the sum of $25,000 and costs.

I have read you the allegations of the plaintiff in the case. This case is brought under a recent Federal Statute, the first section of which is as follows:

"That every common carrier by railroad while engaging in commerce between any of the several States or Territories or
88 between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is so employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent on such employee for such injury or death resulting in whole or in part from the negligence of any of the employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

You will see then that every carrier by railroad, while engaged in commerce, between the states or territories, is held to be under a certain liability. "Shall be liable in damages to any person suffering injury while he is so employed by such carrier in such commerce." Was then the defendant engaged in interstate commerce, and was the person injured while he was employed by such carrier in such commerce. The burden of proof is upon the side holding the affirmative. If he fails in establishing his position in your minds he fails in his case, and it is his duty to prove his position by a preponderance of the evidence. And any evidence that shifts the scale to one side or the other is said to be a preponderance of evidence, or as we may put it a preponderance of the case.

It becomes material as to the first proposition to establish that the person injured was employed by a carrier by railroad engaged in interstate commerce, and the plaintiff urges that in the first place, the defendant is a common carrier by railroad. That is, a railroad

engaged in transporting for hire such persons or commodi-
89 ties as are offered to it for transportation, and if such transportation or commerce is from state to state, between the states, then it becomes interstate commerce.

I undersand the testimony to be undisputed in this case that the railroad was engaged in the ordinary duties of a carrier. Then I understand it to be offered that the car that this employee was employed on in replacing a draw spring, No. 85075, was a car that passed from state to state in the ordinary usage and commerce of the railroad, and if so, it is within the law relating to this subject. I do not understand that there is any testimony on the other side opposed to this statement which I have called your attention to, but it is a fact for you to find, in the first place if it is true that the defendant is a common carrier engaged in interstate commerce and that the plaintiff's intestate received said injury while employed in such commerce it is your duty to state the fact, although the evidence may be uncontradicted.

If you shall find that the defendant road is a common carrier engaged in interstate commerce and the plaintiff's intestate was injured while so employed, you will state the fact, and you will pass to the consideration of the vital part of the case, of the negligence of the defendant road. The language of the statute is,—

—"shall be liable to any person suffering while he is so employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of the employee's parents, and, if none, then of the next of kin dependent on such employee for such injury or death resulting in whole or in part from the negligence of any of the employees of such carrier,—"

Now, did the injuries of the plaintiff's intestate, Daniel Joseph Walsh, the person who suffered injury and died, result in whole or in part from the negligence of the employees or agents of the defendant road?

90 The action, then, is an action in tort for the result of the alleged negligence of the defendant. Now, the fact that there has been an accident is not enough to show negligence on the part of anybody. Now, accidents happen without anybody being legally or morally at fault. So that it is for you to find whether or not under the language of the statute the plaintiff's intestate suffered and died as the result of the negligence of the defendant.

Now, what was the duty of the defendant? It was the duty of the defendant, who was an employee of men engaged in pursuits about the cars, to exercise the reasonable care that a prudent man exercises in having safe appliances and having workmen work in reasonably safe places. It was the duty, as I say, that a reasonably prudent man would exercise. Did the defendant in this case exercise the care of a reasonably prudent man, or was he guilty of what is called negligence?

Now, I have spoken of injuries resulting in whole or in part from the negligence of the employees. I purposely omitted officers and

agents because it is my duty to narrow in your minds, to narrow your duties so that you may know exactly what the law requires. I do not understand in this case that there has been negligence such as would entitle the plaintiff to aver the negligence of any officer; I do not understand that any negligence has been alleged of any agent, except so far as an employee may be held to be an agent. So that you can consider whether or not there was any negligence of any employee of the defendant company.

Now, let me state what the position of the plaintiff is in this regard. He says that Walsh, the plaintiff's intestate, was employed upon the night of February 11, 1909, as car inspector; that he was assisted in such employment by one Keating, who has been upon the stand. The duties of a car inspector apparently are to inspect the cars coming into the station; to find whether they need repairing and to repair them. The plaintiff urges that he was in the
91 exercise of the duty of repairing a car while it was upon track No. 21 of the defendant's yard at Midway where the injury occurred. The plaintiff urges that there was a rule requiring the car inspectors when inspecting a car, or when engaged underneath a car in repairing it while the car was lying upon the track, to put a blue light in a conspicuous position to warn the switching crew and others in charge of the car that there were men employed under that car; and that this light was to be placed upon such car as a protection to those underneath and as a warning to the switchmen and others likely to interfere with that car, warning them that men were employed under that car and in that dangerous locality. It is urged by the plaintiff too, that there being no other rule touching the matter it would not be the duty of a reasonably prudent man to go further when he was to be under the car than to place the lantern, and if there was a practice of informing or telling the switching crew, that was not such care as a reasonably prudent man would exercise, but extraordinary care; that sometimes they did and sometimes they did not. At any rate the care that a reasonably prudent man would exercise would be to follow that rule of placing a blue light upon the car.

Now, the plaintiff says that Walsh on the night in question the night of February 11th, 1909, before proceeding to repair the car either he, or Keating in his presence, or they both together placed a blue light upon the car and that such blue light, or evidence to show that such blue light was in a conspicuous position at the time when the injury resulted. Now, then he says that after Walsh having observed this rule, and that being his only duty as a reasonably prudent man, the observation of the rule of the defendant railroad company, that some employee of the railroad company was guilty of negligence, namely, of letting a car to be switched in upon this switch and come down upon the car, resulting in the injury and death of the plaintiff's intestate. Now, the plaintiff urges that he does not confine this allegation of negligence to Williams, but as to Williams it was his duty to observe the light and
92 that it was there, and that the testimony is negative testimony that while he says that there was no light there that must

mean not seeing it, and was negligent in not seeing the light, and was negligent in switching the car down upon the track.

Under the circumstances, in other words, the plaintiff's intestate had done everything a reasonably prudent man could have done, and some employee of the defendant was guilty of negligence.

Now, the defendant says the burden of proof is upon the plaintiff; that he must show negligence of an employee of the railroad company by a preponderance of the evidence. Now, the defendant says that the whole evidence taken together shall not induce the belief in your minds that the defendant's employees were guilty of negligence. They urge upon you that Williams was not told and that Hoban was not told personally by anyone that the plaintiff's intestate was at work under that car or was to be at work under that car; that there was opportunity to tell, and even if the rule was such as it was, still it became the duty of a reasonably prudent man when going underneath that car in a hazardous position, to notify the switching crew, to notify the boss of the crew if he had the opportunity, and they urged he did have opportunity.

This is upon the questions of facts for you. If you find that the only rule prescribed to be observed around and about the cars at night was that they should display a blue light, and that such protection was adequate in a yard such as the plaintiff's intestate was working in, and under the conditions under which he was working, and was such care as a reasonably prudent man would have taken, then you are entitled to find negligence on the part of the defendant, under those conditions.

If you find that there was a blue light on the car under which Walsh and Keating were working, and as reasonably prudent men they relied upon that rule, you are warranted, if they permitted another car to be moved against the car under which Keating and the plaintiff's intestate were working, the jury are warranted
93 in finding negligence on the part of the employees of the railroad company.

That brings before you what the plaintiff's claim is, and I have stated the questions of fact.

Now, then, the defendant urges, and it is true, that there is no evidence that Walsh or Keating told Williams that they were intending to work beneath the car; that in order to recover for the negligence of the defendant the plaintiff must show that at the time Williams opened the switch to permit the car of the defendant railroad to go on to 21 the blue light was burning on the car so as to apprise Williams of the existence of men beneath the car, or the plaintiff must show by a fair preponderance of the evidence that Williams had some reason to know that the men were beneath the car. And I give the instruction if he had no reason to suppose the men were under the car, and no blue light was burning at that time, then the jury would not be warranted in finding that Williams was negligent.

What the plaintiff and the defendant urge in this matter bring you squarely to that question at issue, was the blue light burning on the car, and there is no question but if the blue light was burn-

ing and Williams with that light burning, allowed that car to go down onto that car under which the plaintiff's intestate was working, that the defendant was guilty of negligence and that you may properly find that the employees were negligent.

It is urged by the defendant that he has affirmative testimony of Williams that no light was there.

It is urged on the part of the plaintiff that Williams is a man under deep interest in the matter; and that his testimony is to be taken with great allowance by a jury of twelve men; if he was guilty of allowing a car to go down when the blue light was there he would be guilty of a very high crime, and that the men without intending to commit perjury, his testimony is colored by great interest;

94 that there is no question as to the testimony of placing the lantern there and that the lantern was there and burning; and that it was burning there at the time, and urge that without explanation of how it came there, how could it have come there unless in the way the plaintiff says. And the plaintiff urges by a clear preponderance of evidence you must find that the light was burning and that owing to mistake or carelessness it was not seen and that either Williams or some employee was negligent and the result happened there from some negligence.

Now, That brings before you the consideration of the negligence of the employee of the defendant, which you are first to pass upon. If you find that the plaintiff has not met the burden placed upon her of showing the negligence of some employee, then you will find for the defendant.

But, upon this question there is one further consideration, the defendant says, that this road, whatever might have been the truth, is another corporation; that there is no testimony properly to be received that this defendant was negligent and say that the action should be dismissed because the defendant is a citizen of Massachusetts and action should not be allowed to proceed because the defendant is a citizen of Massachusetts only.

Now, it is enough for me in disposing of this question, so far as this trial is concerned, to say as the plaintiff requests

"That the defendant in this case and the New York, New Haven and Hartford Railroad Company of Connecticut are on the evidence railroad corporations created by concurrent legislation, having a joint interest in the operation of the entire line of road extending through or into the states of Massachusetts and Connecticut, and the defendant in this case is liable for a tort committed in the operation of the road in Connecticut, if all the other elements of liability going to show negligence are made out," and

95 "Railroad corporations created by concurrent legislation of two or more states, having a joint interest in the operation of the entire line of road extending through or into such several states, are jointly liable for a tort committed in its operation in either state."

So that I do not leave any question for you to decide in that regard, but leave you to pass upon the question of negligence as I have submitted it to you here.

If you find that the plaintiff has met the burden of showing the negligence of some employee, and death resulted in whole or in part from such negligence, then you will pass to the narrower consideration of the case. Section 3 of the Act says:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Now, the defendant urges that even if you should find that the defendant's employees were negligent, and that the injury occurred in whole or in part by such negligence, even then the defendant urges that the employee has been guilty of contributory negligence, and that the damages shall be diminished by a large amount, and that the damages may be diminished by the amount of negligence attributable to such employee.

Now, the plaintiff urges on the other hand that the bur-
96 den of contributory negligence is upon the defendant in the Federal Court, and to show that there was such contributory negligence, namely that the plaintiff did not use the care of a reasonably prudent man under the circumstances, and the burden is upon the defendant to show this, and to satisfy you by a fair preponderance of the evidence that the plaintiff was guilty of contributory negligence. The burden is upon the defendant to show how much the damage shall be diminished by the jury in proportion to the amount of negligence.

Now, the defendant urges that the plaintiff's intestate was negligent, in the first place, by not placing a blue light upon the car when he was proceeding under it to work. And the defendant urges that the whole testimony taken together, that of Williams and the condition of the lantern, that they have shown by a preponderance of the evidence that, as a matter of fact, no blue light was lighted and placed there and was there when the other car was switched in upon car No. 85075.

The defendant goes further, as I have indicated in discussing the proposition of negligence on the part of the defendant road,—the defendant goes further and says that even if the lamp were lighted under the rule requiring the lamp to be lighted, even then, under the practise of the employees of the road, it was the duty of a reasonably prudent man to have gone further and notified the switching crew before he went under that car in that hazardous position, to have gone further than to have observed the rule, and to have notified the switching crew that he was going in that hazardous position.

The plaintiff urges on the other hand it was the duty of a reason-

ably prudent man when there was a rule of the railroad company before him to observe the rule, and that no practise existed, sometimes the men did and sometimes the men did not as they had opportunity of notifying the switching crew that they were going under the car, but that no such duty was required, and that
97 no such duty was presumed of a prud*ne*t man. No reasonably prudent man would be called upon to do more than to observe the rule and to light the light and to leave it.

Now, I instruct you, that if the jury find that the only rule with reference to giving notice was that a blue light should be displayed, and that no instruction outside of the rules had been given to Keating or the plaintiff's intestate to give other warning and a reasonably prudent man would not have given any other warning then you may be warranted in finding that the plaintiff's intestate was in the exercise of due care in going to work under the car after he, or Keating in his presence and to his knowledge, had placed a blue light on the car under which they were to work, and

If the jury find when the plaintiff's intestate went to work underneath that car either the plaintiff's intestate or Keating with the knowledge of the plaintiff's intestate, put out a blue light on the car, the jury are warranted in finding that the plaintiff's intestate was in the exercise of due care. Unless they should find it to be the duty of a reasonably prudent man, under all the circumstances, to go further than the rule and to give further warning to the switching crew that they were going beneath the car.

That brings clearly before you the question of fact which I have stated to you which arose under this condition, and in order to bring that clearly before you, I will give what the defendant urges in this regard, namely

If it shall appear that the plaintiff's intestate had an opportunity to warn the men of the switching crew, and that it was the practise to inf*rom* the switching crew when they purposed to work beneath the car, then that it would have been the exercise of due care on his part to have warned the switching crew if he had an opportunity to do so, then the jury may find that Walsh contributed to the injury and to the extent he conttributed they may mitigate the damages, assuming that they find some officer, agent or em-
98 ployee of the defendant negligent.

"The circumstances and exigencies of working at night in a freight yard where there are many tracks and a constant moving of cars and engines at varying rates of speed require from the men so employed the utmost vigilance to protect themselves from injury.

It is true that the circu*n*stances and exigencies of working at night in a freight yard, with trains coming in upon the tracks at varying rates of speed required from the men or employees vigilance to protect themselves from injury. I couldn't put it better. The contention being, gentlemen, that men employed in positions of that sort and circumstances are held to the care of reasonably prudent men under the circumstances.

Now, the defendant says that the man did not exercise the care of a reasonable prudent man; that they didn't notify them.

The plaintiff says, on the other hand, *says* that he exercised all the care of a reasonably prudent man in obeying the rule, in lighting the lamp and having it lighted; and that all the testimony taken together induces the belief that the lamp was lighted and remained lighted up to the time of the injury. And further that the circumstances of the case did not require that a reasonably prudent man should go further than that; that if there should be held to be a further duty binding upon men under the circumstances it would interfere with the operation of the road because no one would know when he had protected himself in notifying one switching crew or another, one man or another, but that the duty clearly, and no prudent man could do any more than light the lantern. And so far as the lighted lantern is concerned, learned counsel contend it would be extreme care, or beyond that which was required by the rule.

Gentlemen, was the lantern lighted. Did Walsh and Keating observe the rule of lighting the lantern? Would a reasonably prudent man go any further than that and notify the switching crew?

99

That brings the question clean and clear before you as I think. If you say the defendant has met the burden of showing the plaintiff's intestate was guilty of contributory negligence under the rule I have given you, then it is for you to say how much shall the damage be diminished. That is in what proportion is it attributable to such employee, and if you find anything, that is to be deducted. If you find that the defendant's employee was negligent and death resulted wholly or in part from that negligence, and if you find further than that and find a verdict on that amount; and find, beyond that, that the defendant met the burden and showed contributory negligence on the part of the plaintiff's intestate, then deduct from anything you should find for the plaintiff any proportion that is attributable to the plaintiff's intestate.

If you find then, having found that the defendant company was a common carrier and engaged in interstate commerce, that the plaintiff's intestate was injured and died while employed by such carrier engaged in such commerce, interstate commerce, died as a result, in whole or part, of negligence of the employees of the defendant; if you find that the plaintiff met his burden of showing that; and if you find that the defendant has not met his burden of showing contributory negligence on the part of the plaintiff's intestate, or if you find he has met his burden of showing that there was contributory negligence, then the negligence of the defendant company should be reduced by the negligence attributable to the plaintiff's intestate, and if that reduction does not take away the entire amount of the verdict which you find proper for the plaintiff on account of the negligence of the defendant company's employees, then you will fix the question of damages under the rules which I will give.

100 Now, the damages, under the general rule, shall be compensable, and the measure of damages is compensation for the pecuniary loss sustained by the widow and children of the plaintiff's intestate. As a Court the Federal Court has stated the amount to be recovered in a case similar to that is judged by his character, earning capacity, his habits and morals, and his cares and attention and solicitude for his children. The jury cannot proceed arbitrarily but with a proper consideration of the facts developed at the trial.

It is for you to pass upon this question as reasonable men, what was the life of the plaintiff worth to the widow and children under such fair and reasonable rules as can be given and in consideration of reasonable men. I must leave it to you as reasonable men. You have before you what is the reasonable expectation of the life of this man. How long would he live? About what was he earning? About what was the cost of living? About what was he worth to that widow and children? What as age advanced would he be worth? If you find the expectation of life it is open for consideration whether or not his earning capacity might be more or less, whether up to a certain age it might be more or less, and the years that it would be less. It is for you to take into consideration all of these facts.

Now, I have permitted an actuary to come upon the stand as an expert to give you the benefit of the experience of men who have figured upon those things, if you shall gain any advantage from such testimony. I don't know whether you will or not. There is nothing binding in such testimony any more than it has permitted the use of such tables as has ordinarily been made by lawyers of both sides. The testimony of the actuary is competent called in this way and the Courts have said of it that mortuary and annuity tables may be used as an aid in determining any age and its present value.

101 Life and annuity tables are competent, but has not found that the rules held in such tables must be an absolute guide to the judgment of the Jury. They furnished no absolute rule. They are like all testimony; they are given to the jury for whatever the jury shall find is their probative value. The Court has permitted the use of standard life annuity tables showing the prabably duration of life. Neither life nor annuity tables can ascertain this definitely but it is a guide to reasonable estimate. It has always submitted standard life and annuity tables showing the probable value of life, and they are admitted for such value as they may have. They are admitted in evidence in action for personal injuries where it is necessary to ascertain the compensation for such injury. Now, as the Court has said it also depends on other matters such as the health, and the habits of life, his surroundings and other circumstances. So I have tried to show you that it is not binding upon the jury any more than any testimony. It is for you to get such aid from it as you may find it may give to you. That is for you to decide, the probative value of the testimony.

I instruct you.—Life or mortuary tables may be used as an aid in determining the probate duration of human life. They do not furnish any absolute rule of computation. Each case must stand

on its own conditions. The jury are to determine whether or not the deceased would live out the term of his life expectancy and in determining this they are to consider his character, habits and morals, his state of health, his care of himself and the occupation in which he was engaged. And the plaintiff requests me to give the instructions, and I do give it. "Annuity tables may be considered by the jury in ascertaining the compensation the plaintiff is entitled to receive for the pecuniary injury done to the widow and children by the death of the intestate; but the jury are also to consider the state of health of the intestate, his age, habits, occupation and the likelihood of his being able to continue to work during the period of the expectancy of life."

102 The defendant urges,—"Inasmuch as there have not been offered and standard life or annuity tables showing at any age the probable duration of life and the present value of a life annuity based upon the evidence in this case,"—then I instruct you that there is no evidence that is binding upon you; there is evidence which is admissible, but, like all testimony, it is for you to say what value you shall give it as to the compensation which the plaintiff is entitled to recover.

And the defendant urges that $900.00 per year does not fairly represent the yearly value of the plaintiff's life, measured in dollars and cents, and that this sum should not be recovered on the ground that that would not be his fair earning capacity, because it would have the proper deductions made from it. I cannot say that you have no right to consider it, but you are not bound by the price of an annuity bringing in $900.00 a year. And still, gentlemen, if you use the actuary's testimony at all, you must use it with great care. You must be guided by your judgment. The defendant urges that there is no fair and just way in which the jury can find from the evidence any large sum as showing the earning capacity during the expectation of life. And under a fair consideration of the evidence the damage should be small. The plaintiff, on the other hand, says, here is a man shown to have earned a certain amount a week—$17.70,—that he was a man of good health, a man of good moral character, his habits of life would be unchanged to a great extent, that as a man his prospects of life were that his earning capacity would not be reduced, and even as age advanced would not be so materially reduced but that the value to his widow and children would be something large and substantial.

You cannot in any event exceed the amount of the ad dam-
103 num and you are not to be governed by anything but a consideration of the facts if you come to the question of damages. I do not prejudge your coming to that question. But, if you do come to that question you must consider the facts in the case on the evidence. You must consider that it is not the prerogative of the jury to be generous with other people's money. It is to be just in your consideration of the testimony in the case.

Now, with this I propose to instruct you a little more as to the question of damages. If you find then for the plaintiff on the question of an employee's negligence there should be a verdict re-

turned for the plaintiff, and if you find there has been no contributory negligence on the part of the plaintiff, and further, if you find that the plaintiff has met with contention in showing that there was negligence of any employee and you find that the defendant has met his burden of showing that there was contributory negligence on the part of the plaintiff's intestate, then you will proceed to the question of damages, and if you find damages, then you should consider how these damages are diminished in proportion to the amount of negligence attributable to the employee. So, if you come to that question and find damages, and find there was contributory negligence on the part of the plaintiff's intestate, you diminish the verdict by such amount as the negligence was attributable to this employee.

And with these rules, gentlemen, it is for you to take the case fairly and impartially and pass upon the questions of fact which I have submitted to you. The case has been well tried, well tried by thoroughly competent lawyers, and the issues clearly put before you.

It is clearly your duty to agree upon a verdict in the case.

104 At the close of the charge counsel for the defendant duly excepted to the court's refusal to give defendant's requests for rulings 1 to 14 inclusive, 17, 19 and 22. The defendant also excepted to the ruling of 23, 24 and 25 in the form in which they were given and to the refusal of the court to give 25, 28, 29 and 30. The defendant also excepted to that part of the charge relating — Williams opening the switch and the circumstances tending to place the lantern there. The defendant also excepted to the court's instructions as to damages because the instructions were inconsistent with the defendant's requests.

Mr. HALL: That there was compensation and damages I should except to. Also your Honor pointed out that the measure of damages to the plaintiff's widow and children depended upon his solicitude and care as a father, and the specific instruction was what was that life worth to the widow and children and to the reasonable expectation as to what he would receive as life advanced, what he would be able to earn. And all the tables show that the probabilities are that he would have died before he reached the age of 42; that if he did not his power of earning would have been very much decreased. The defendant also excepted to the way the plaintiff's three requests was given as modified, to the giving of the plaintiff's fourth request in the modified form and the fifth and sixth requests as modified and to the giving of the 7th, 9th, 10th, 11th and 12.

The foregoing is all the evidence and proceedings material to the determination of these exceptions. The plaintiff waived her fifth count and the case was submitted to the jury only on the second count. The jury found for the plaintiff.

Wherefore the defendant being aggrieved by the rulings of the court and its refusals to rule, files this its bill of exceptions and prays it may be allowed.

By Its Attorney, JOHN L. HALL.

Exceptions allowed; judgment ordered.

CLARENCE HALE,
Dist. Judge.

May 6, 1910.

105 (*Mass. Special Laws, Vol.* 8, *p.* 116; 1839, *Chap.* 101.)

An Act to Incorporate the Hartford and Springfield Railroad Corporation.

Be it enacted, &c.:

SECTION 1. That Charles Stearns, George Dwight, Stephen O. Russell, and George Bliss, their associates and successors, are hereby made a corporation, by the name of the Hartford and Springfield Railroad Corporation, with all the powers and privileges, and subject to all the duties, liabilities, and provisions contained in that part of the thirty-ninth chapter of the Revised Statutes, which relates to railroad corporations, in the statute of one thousand eight hundred and thirty-seven, chapter two hundred and twenty-six, in the statute of one thousand eight hundred and thirty-eight, chapter ninety-nine, and in the forty-fourth chapter of said Revised Statutes; and said corporation is hereby authorized and empowered to locate, construct, and finally complete a railroad from a point in Springfield, to the north line of the State of Connecticut, commencing either at or near Chicopee River, or at or near the village of Springfield, and passing southerly as near the Connecticut River as is convenient, and in the valley of the river, either upon the east side thereof, through a part of the town of Springfield, and near the mouth of the Pecowsic Brook, and thence through the meadows in the town of Longmeadow, in the general direction towards Thompsonville to the line of the State of Connecticut; or upon the westerly side of the Connecticut River, and as near the same
106 as is conveniently practicable, through a part of the town of West Springfield, to the line of the State of Connecticut, with a view to unite the said railroad with a railroad authorized by the legislature of Connecticut, from Hartford to the line of the State of Massachusettts.

SEC. 2. The capital stock of said corporation shall not exceed the sum of three hundred thousand dollars, and shall be divided into shares of one hundred dollars each; and the said corporation may purchase and hold such real estate, materials, engines, cars, and other things, as may be necessary for depots, for the use of said road, and for the transportation of persons, goods, and merchandise.

SEC. 3. The said corporation may unite the track of their road with the Western Railroad, at such safe and convenient place, near the Connecticut River, as shall not interfere with the depot building of the Western Railroad Corporation, they paying all expenses incident thereto. And the said Hartford and Springfield Railroad Corporation may cross the track of the Western Railroad, in such safe and convenient place near said river, as will not interfere with said buildings, or obstruct the convenient use of the track of said Western Railroad.

SEC. 4. The legislature may authorize any company to enter with another railroad at any point of said Hartford and Springfield Railroad within this State, and use the same, or any part thereof, paying therefor such a rate of toll or compensation as the legislature may from time to time prescribe, or that may be fixed under the provisions of any general law of this Commonwealth
107 complying with such rules and regulations as may be established by said Hartford and Springfield Railroad Corporation: provided, however, that no other corporations shall enter upon said Hartford and Springfield Railroad, with any motive power, unless the said Hartford and Springfield Railroad Corporation shall refuse to draw over their road, or any part thereof, the cars of any other railroad corporation which may be authorized to enter with their railroad upon the road of said Hartford and Springfield Corporation.

SEC. 5. The legislature may, after the expiration of five years from the time when the said railroad shall be opened for use, from time to time, alter or reduce the rate of tolls or other profits upon said road; but the said tolls shall not, without the consent of said corporation, be so reduced as to produce, with said profits, less than ten per cent. per annum.

SEC. 6. If the said corporation shall not have been organized, and the location of the route of said road filed with the County Commissioners of the County of Hampden, within two years from the passage of this Act, or if the said corporation shall fail to complete said road, within three years from the passage of this Act, the same shall be void.

SEC. 7. The persons who shall become stockholders in the Hartford and Springfield Railroad Company, incorporated by the legislature of the State of Connecticut, in the year one thousand eight hundred and thirty-three, shall be stockholders of this corporation, together with such persons as shall become stockholders of this corporation; and when the stockholders shall by vote have
108 assented thereto, the said corporations shall become united into one corporation, by the name of the Hartford and Springfield Railroad Corporation, with a capital not exceeding the amount of the joint capital of both corporations; and all the tolls, franchises, rights, powers, privileges, and property, granted or to be granted, acquired, or to be acquired, under the authority of the State of Connecticut or of this State, shall be held and enjoyed by all the said stockholders, in proportion to their number of shares in either or both of said corporations.

SEC. 8. After the said union shall be perfected, the said stockholders shall hold their meetings, make their by-laws, appoint their officers, and transact all their business, as one corporation: provided, that one or more of the officers of said corporation shall be resident in this commonwealth, and one or more of them in the State of Connecticut, on whom process against said corporation may be legally served in either State; and said corporation shall be held to answer within the jurisdiction where such service shall be made and the process is returnable.

SEC. 9. The share or shares of any stockholder in said corporation shall be liable to attachment, and to be taken on execution, in the State where such stockholder shall reside at the time of the service of such process: Provided, the laws of such State authorize the attachment and taking on execution of such property; and an attested copy of such writ or execution, and of the return of the officer thereon, shall, at the time of such service, be left with the clerk or a director of said corporation, or at his usual place of abode, by the officer making the service.

109 SEC. 10. The said Corporation shall so make out and keep an account of the expenditures on said road, from its commencement to its completion, as clearly to exhibit what proportion thereof belongs to that part of said road situated in Massachusetts, and what portion to that part in Connecticut. And two commissioners shall be appointed, one by the governor of each State, to hold, their offices for the term of four years, and to be reasonably compensated for their services by said corporation, who shall ascertain what proportion of expenditures on said road, and of the other expenses attending its construction, maintenance, and use, also what proportion of the receipts and profits of said railroad shall properly appertain and belong to the portions of said road in each state respectively. And the annual report required to be made by the directors to the legislature of this Commonwealth, shall be approved by the said commissioners.

SEC. 11. The said corporation, so far as their road is situated in Massachusetts, shall be subject to the general laws of this state, to the same extent as if their road were wholly therein.

SEC. 12. The seventh, eighth, ninth, and tenth sections of this act shall not take effect until the legislature of the state of Connecticut shall have enacted provisions similar to those contained in the said sections, nor until the provisions so enacted in each state shall have been accepted by the stockholders of each of said corporations, at meetings duly called for the purpose; nor until the same shall have been accepted by the stockholders of said united cor-

110 poration at a meeting called for the purpose; at which meeting they may ratify and confirm all or any of their former doings, and adopt them as the acts and doings of said united corporation.

Approved, April 5, 1839.

111 (*Mass. Special Laws, Vol.* 8, *p.* 321; 1844, *chap.* 28.)

An Act in Addition to an Act to Incorporate the Hartford and Springfield Railroad Corporation.

Be it enacted, &c.:

SECTION 1. That the time allowed by the statute of one thousand eight hundred and thirty-nine, chapter one hundred and one, and the statute of one thousand eight hundred and forty-one, chapter seventy-two, for the Hartford and Springfield Railroad Corporation, to file with the county commissioners of the county of Hamp-

den, the location of the route of their railroad, is hereby extended for one year from and after the fifth day of April next; and the time allowed by said statutes, for the completion of said road, is hereby further extended for two years, from and after the said fifth day of April next; and the filing of the location of said road, in the manner and within the time herein prescribed, shall be as valid and effectual as if the same had been filed with the county commissioners, according with the provisions of the first mentioned statute: Provided, however, that the provisions of this section shall not apply to that portion of the said railroad between the Western Railroad and Chicopee River.

SEC. 2. The persons who now are, or may hereafter be stockholders of the Hartford and New Haven Railroad Company, a corporation established by an act of the legislature of the state of Connecticut, shall be stockholders of this corporation, together with such persons as now are or may hereafter become stockholders of this corporation; and when the stockholders shall by vote have assented thereto, the said corporations shall become united
112 in one corporation by the name of the New Haven and Springfield Railroad Company, with a capital not exceeding the amount of the joint capital of both corporations, and all the tolls, franchises, rights, powers, privileges and property granted, or to be granted, acquired, or to be acquired, under the authority of the state of Connecticut, or of this state, shall be held and enjoyed and by all the said stockholders, in proportion to their number of shares, in either or both of said corporations.

SEC. 3. After the said union shall be perfected, the said stockholders shall hold their meetings, make their by-laws, appoint their officers, and transact all their business as one corporation: Provided, that one or more of the officers of said corporation shall be resident in this Commonwealth, and one or more of them in the state of Connecticut, on whom process against said corporation may be legally served in either State: And said corporation shall be held to answer within the jurisdiction where such service shall be made and the process is returnable.

SEC. 4. The share or shares, of any stockholder in said corporation shall be liable to attachment, and to be taken on execution, in the state where such stockholder shall reside at the time of the service of such process; provided, the laws of such state authorize the attachment and taking on execution of such property; and an attested copy of such writ, or execution, and of the officer's return thereon, shall at the time of such service, be left with the clerk, or a director of said corporation, or at his usual place of abode by the officer making the service.

113 SEC. 5. The said corporation shall so make out and keep and account of the expenditures on said road from its commencement to its completion, as clearly to exhibit what portion thereof belongs to that part of said road situated in Massachusetts, and what portion to that part in Connecticut; and two commissioners shall be appointed, one by the governor of each state, to hold their

offices for the term of four years, and to be reasonably compensated for their services by said corporation, who shall ascertain what proportion of the expenditures on said road, and of the other expenses attending its construction, maintenance, and also what proportion of the receipts and profits of said railroad, shall properly appertain and belong to the portions of said road in each state respectively; and the annual reports required to be made by the directors to the legislature of this commonwealth, shall show the amounts of expenditures, receipts, and profits, as aforesaid, which belong to the parts of said road, situated in said two states respectively; and said reports shall be approved by said commissioners.

SEC. 6. The said corporation, so far as their road is situated in Massachusetts, shall be subject to the general laws of this State to the same extent as if their road were wholly therein.

SEC. 7. The second, third, fourth, and fifth sections of this Act shall not take effect until the legislature of the state of Connecticut shall have enacted provisions similar to those contained in said sections, nor until the provisions so enacted shall have been accepted by the stockholders of both of said corporations, at meetings duly called for the purpose, nor until the same have been accepted
114 by the stockholders of said united corporation, at a meeting called for the purpose, and at which meeting they may ratify and confirm all or any of their former doings, and adopt them as the acts and doings of said united corporation.

Approved, February 23, 1844.

115 (*Mass. Special Laws, Vol.* 8, *p.* 809; 1847, *chap.* 244.)

An Act in Addition to an Act to Incorporate the Hartford and Springfield Railroad Corporation.

Be it enacted, &c.:

SECTION 1. When the Hartford and Springfield Railroad Corporation shall be united with the Hartford and New Haven Railroad Company, according to the terms of the Act in addition to an Act to incorporate the Hartford and Springfield Railroad Corporation, passed on the twenty-third of February, in the year one thousand eight hundred and forty-four, and according to similar provisions of laws heretofore enacted by the legislature of the state of Connecticut, said united corporation shall be called the Hartford and New Haven Railroad Company.

SEC. 2. The said corporation, so far as their road is situated in Massachusetts, shall be subject to the general laws of this Commonwealth, to the same extent as if their road were wholly therein.

Approved, April 23, 1847.

116 *Mass. Acts & Resolves*, 1872, *Chap.* 171.

An Act to Authorize the Hartford and New Haven Railroad Company to Consolidate with the New York and New Haven Railroad Company.

Be it enacted, etc.:

SECTION 1. The Hartford and New Haven Railroad Company may sell, transfer, merge and consolidate its corporate rights, powers and estate to, into and with the New York and New Haven Railroad Company, upon such considerations, terms, stipulations and conditions as may be agreed upon between said corporations and as are authorized by the provisions of this act.

SEC. 2. The directors of said corporation may enter into proper agreements for the sale, transfer, purchase and merger hereby authorized, prescribing the terms and conditions thereof, the mode of effecting such transfer, merger and consolidation, and the number of directors thereof, one or more of whom shall be citizens of this Commonwealth, the amount of the capital stock of such consolidated corporation, which shall not exceed the present capital of said companies, the manner of converting the capital stock of said original corporations into the capital stock of said consolidated corporation, and such other matters and things as may be necessary or proper to effect the purposes and merger aforesaid; provided, however, that such agreement of the directors hereinbefore authorized shall be submitted to the stockholders of each of said corporations separately, at meetings specially called for that purpose, and, if approved by a vote of at least two-thirds of the stock represented at each of said meetings, said agreement so to be made by said directors shall become the agreement of said corporations respectively, and a certified copy thereof, together with a certificate of the adoption thereof by the stockholders of said respective corporations, under the hand of the secretary of each of said corporations, shall be filed in the office of the secretary of this commonwealth.

117 SEC. 3. Upon the filing of such certificate said companies shall become and be merged and consolidated into one corporation, under the name of the New York, New Haven and Hartford Railroad Company, and shall become and be a body politic and corporate, and shall possess, hold, and enjoy all the rights, powers, franchises and privileges, theretofore vested in either of said corporations, and all property, real and personal, of said companies, shall be deemed to be vested in said consolidated corporation.

SEC. 4. All rights of creditors and all liens upon the property of either of said corporations shall continue unimpaired, and all debts, contracts and liabilities of either of said corporations shall continue unimpaired, and shall attach to and become binding upon such consolidated company, and may be enforced in the same manner and to the same extent as if incurred by said latter corporation, and in the courts of Massachusetts in all cases in which the claimants shall so elect.

SEC. 5. Said consolidated corporation shall be subject to the charter of the corporation into which such merger is made, provided, however, that when a special duty or liability is imposed, or any special franchise, privilege or immunity is conferred on the corporation so merged by its charter, such duty or liability shall attach to and be discharged by, and such franchise, immunity or privilege be enjoyed by such consolidated corporation, so far as the same is applicable to the road and franchise of said merged corporation.

SEC. 6. Said consolidated corporation shall ticket passengers, check baggage, way-bill freight, transfer cars and give full and equal facilities for the convenient transfer of passengers, baggage and freight, to and from all connecting railroads, and shall make no unequal discrimination for or against either of such railroads, or any railroad that may at any time meet or connect with the said consolidated railroad.

118 SEC. 7. Said consolidated corporation shall at all times be subject to the legislature of this state as to that portion of its road in this state, as heretofore; and shall be subject to the general laws of this state as to its whole road so far as such laws may be applicable thereto.

SEC. 8. The provisions of the eleventh section of the charter of the New York and New Haven Railroad Company shall remain in force and apply to that portion of the road of the consolidated company which is now the New York and New Haven Railroad, and, for the purposes contemplated in that section, the portion of the consolidated road which is now the Hartford and New Haven Railroad, shall forever be considered a connecting road.

SEC. 9. This act and any act regarding the said consolidated corporation, shall be subject to alteration, modification or repeal by the legislature.

SEC. 10. This act shall take effect upon its passage.

Approved, April 5, 1872.

119 *Conn. Public Acts*, 1871, *Chap.* 129.

An Act in Addition to an Act Entitled An Act Concerning Communities and Corporations.

Whereas, for their common benefit and interest, and for the convenience and benefit of the public, the New York and New Haven railroad company and the Hartford and New Haven railroad company, did on the 3d day of August, 1870, enter into certain perpetual covenants and agreements, under authority of and in accordance with the statute laws of this state, which covenants have been fully adopted and approved by the unanimous vote of the stockholders of said Hartford and New Haven railroad company, and by the vote, almost unanimous, of the stockholders of said New York and New Haven railroad company; which covenants and agreements have merged the entire railways and properties of said corporations into a joint estate, and have brought the manage-

ment of both of said corporations under a common board of managers, and have secured perpetually the income of both said roads to be a common fund for the expenses, and liabilities, and dividends, of both companies, and as it would be for the convenience and best interest of said companies, and of the traveling and shipping public having dealings with them, that said companies should have a single corporate existence; therefore,—

Be it enacted, etc.:

SECTION 1. The Hartford and New Haven railroad company may sell, transfer, merge, and consolidate its corporate rights, powers, and estate, to, into, and with the New York and New Haven railroad company, upon such consideration, terms, stipulations, and conditions, as may be agreed upon between said corporations, and are authorized by the provisions of this act.

SEC. 2. The directors of said corporations may, in the names and under the seals of their respective corporations,
120 enter into joint articles of agreement for the sale, transfer, purchase, merger, and consolidation hereby authorized, prescribing the considerations, terms, and conditions thereof, the mode of effecting such transfer, merger, and consolidation, the name of such consolidated corporation, and the number of directors thereof, which shall not be more than twenty-one, nor less than nine, a majority of whom shall be citizens residing in this state, and the persons who shall act as such directors until the next regular election of directors by said consolidated corporation, the number of shares, and the amount of the capital stock of said consolidated corporation, which shall not exceed the present authorized capital of said companies, the manner of converting the capital stocks of said original corporations into the capital stock of the consolidated corporation, and the compensation to be made for fractional parts of shares, and such other matters, things, and details, as may be necessary or proper to effect the purposes and merger aforesaid.

SEC. 3. Said agreement of the directors hereinbefore authorized shall be submitted to the stockholders of each of said corporations separately, at a meeting specially called for that purpose, and if approved by a vote of at least two-thirds of the stock represented at each of the said meetings, and not otherwise, said agreement made by said directors shall become the agreement of said corporations respectively, and a certified copy thereof, together with a certificate of the adoption of said agreement by the stockholders of said respective corporations, under the hand of the secretary of this state, and thereupon said Hartford and New Haven railroad company shall be and become merged and consolidated in and with said New York and New Haven railroad company; and said consolidated corporation shall continue a body politic and corporate, under the corporate name of the New York, New Haven, and Hartford Railroad company, and shall possess, hold, and enjoy all the rights,
powers, franchises, and privileges theretofore vested in either
121 of said corporations; and all the property, real and personal, including all rights of way and rights of action, belonging to either of said corporations, shall be deemed and taken to be trans-

ferred to and vested in the corporation into which such merger is made, without further act or deed to be done, executed, or performed; provided, that nothing in this act shall be so construed as to authorize said last named corporation to merge, consolidate, or make joint stock with any other railroad company, or make perpetual lease with any such railroad, without consent of the general assembly first had and obtained.

SEC. 4. All rights of creditors and all liens upon the property of either of said original corporations, shall continue unimpaired, and all debts, contracts, and liabilities of either of said original corporations shall attach to, and become binding upon such consolidated company, and may be enforced in the same manner, and to the same extent, as if contracted or incurred by said latter corporation; and said original corporations shall at all times be taken to be in existence in their original names and capacities for the enforcement of any and all claims in favor or against either of said corporations.

SEC. 5. If any stockholder of either of said original corporations shall, at said meeting of stockholders, or within sixty days thereafter, object to such proposed transfer and merger, and signify to such corporation his objections in writing, such stockholder, or said consolidated corporation may, if said contract of merger shall have been approved and taken effect as aforesaid, at any time thereafter, apply by petition in writing, to any judge of the superior court to appoint one or more disinterested persons to appraise the value of the shares or share of such stockholder, and said judge—reasonable notice first being given to the adverse party, which notice said judge is authorized to prescribe—shall appoint one or more dis-
122 interested persons to make such appraisal; and said person or persons so appointed shall, under oath, appraise the value of said stock, and make return thereof in writing under his or their hands, to said judge, who shall lodge the same with the clerk of the superior court, in the county in which such application shall be made, and said clerk shall record the same; and when so returned and recorded, such appraisement shall have the effect of a judgment, and execution may issue therefor in favor of such stockholder against said corporation; and said appraisement shall be paid in full by said corporation to said stockholder if to be found within this State; if not, then to the treasurer of the state, who is hereby authorized to receive and hold the same on deposit for the use, and to the order of such stockholder; and when said appraisement shall have been so paid or depositted as aforesaid, said stockholder shall cease to have any further interest therein, and shall, on demand made, surrender said stock and all certificates thereof to said corporation; and the fees of said appraisers and of said clerk, shall be taxed by said judge and paid by said corporation.

SEC. 6. Said consoldidated corporation shall be subject to the charter of the corporation into which such merger is made, as such charter may be modified by such agreement of merger, and by the provisions of this act; provided, however, that when a special duty, liability, or burden is imposed, or any special privilege, franchise, or immunity conferred on the corporation so merged, as aforesaid,

by its charter, such duty, liability, or burden shall, until otherwise ordered, attach to, and be discharged by, and such franchise, immunity or privilege be enjoyed by such consolidated corporation, so far as the same were applicable to the road and franchise of said merged corporation.

SEC. 7. Said consolidated corporation shall ticket passengers, check baggage, way bill freight, transfer cars, and give equal facilities for the convenient transfer of passengers, baggage, and
123 freight, to and from all connecting railroads, and shall make no unequal discrimination for or against either of said railroads in its joint passenger and freight rates, or in the division of said rates.

SEC. 8. Said consolidated corporation shall at all times be subject to the power, control, and legislation of the general assembly of the state.

SEC. 9. This act shall take effect upon its passage.

Approved, July 26th, 1871.

124 *Private Laws of Conn., Vol. I, p.* 1002.

Resolve Incorporating The Hartford and New Haven Railroad Company. Passed May, 1833.

SECTION 1. Resolved by this Assembly, That James Brewster, John Babcock, John S. Mitchell, Joel Root, Alexander Harrison, Obadiah Pease, Richard Hubbard, Elisha A. Cowles, with such other persons as shall associate with them for that purpose, are constituted a body politic and corporate by the name of "The Hartford and New Haven Railroad Company," and by that name to sue and be sued, plead and be impleaded, in any court in this state, to make and have a common seal, and the same to break, alter, or renew at pleasure; and the company is hereby vested with all powers, privileges, and immunities which are or may be necessary to carry into effect the purposes and objects of this act, as hereinafter set forth; and said company is hereby authorized and empowered to locate, construct, and finally complete a single, double, or treble railroad or way, from some suitable point in the town of Hartford, by the most direct and feasible route to the city of New Haven; and to the navigable waters of New Haven harbor, at some point between the canal basin and the west end of Tomlinson's bridge, so called; and to transport, take, and carry property and persons upon said railroad or way, by the power and force of steam, of animals, or of any mechanical or other power, or any combination of them which said company may choose to apply; and for the purpose of constructing said railroad or way, the said company is hereby authorized to lay out their road, not exceeding six rods wide, through the whole length, and for the purpose of cutting and embankments; and for obtaining stone and gravel may take as much more land as may be necessary for the proper construction and security of said road.

Provided, that all damages that may be occasioned to any person or corporation, by the taking of such land or materials for the pur-

pose aforesaid, shall be paid for by said company in manner
125 hereinafter provided. And further provided, that no part of said railroad or way shall be located or constructed within the limits of the city of Hartford, except with the consent of the mayor, aldermen, common council, and freemen of said city, and upon such terms and conditions as said mayor, aldermen, common council, and freemen, and said railroad corporation shall mutually agree.

SEC. 2. That the capital stock of said company shall be five hundred thousand dollars, with the privilege of increasing the same to one million of dollars, and to be divided into shares of one hundred dollars each, which shares shall be deemed personal property, and be transferred in such manner as the by-laws of said company shall direct.

SEC. 3. That the persons named in the first section hereof, or a majority of them, shall open books to receive subscriptions to the capital stock of said company, at such time and place as they or a majority of them may appoint, and shall give such notice of the times and places of opening said books as they may deem reasonable, and shall receive said subscriptions under such regulations as they may adopt for the purpose; and if more than five thousand shares of stock shall be subscribed they shall have power to make the shares so subscribed the capital stock of the company. Provided they shall not exceed ten thousand shares, and in case the subscriptions shall exceed ten thousand shares the same shall be reduced and apportioned in such manner as may be deemed most beneficial to the corporation.

SEC. 4. That the immediate government and direction of the affairs of the company shall be vested in a board of seven directors, who shall be chosen by the stockholders of said company, in the manner hereinafter provided, and shall hold their offices until others are duly elected and qualified to take their places as directors; and the said directors, a majority of whom shall be a quorum for
126 the transaction of business, shall elect one of their number to be president of the board, who shall also be president of said company; they shall choose a clerk and treasurer, and the treasurer so chosen by them shall give bonds, with security to such company, in such sum as the said directors may require for the faithful discharge of the trust.

SEC. 5. That the persons named in the first section hereof are hereby authorized, after the books of subscription to the capital stock of said company are closed, to call the first meeting of the stockholders of said company, in such way and at such time and place as they may appoint for the choice of directors of said company; and in all meetings of the stockholders of said company, each share shall entitle the holder thereof to one vote, which vote may be given by said stockholders in person, or by lawful proxy; and the Annual Meeting of the stockholders of said company for the choice of directors shall be holden at such time and place and upon such notice as the said company in their by-laws may prescribe.

SEC. 6. That in case it shall so happen that an election of directors should not be made on any day appointed by the by-laws of said

company, such company shall not for that cause be deemed to be dissolved, but such election may be held on any day which shall be appointed by the directors of said company.

SEC. 7. That the directors shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper, touching the disposition and management of the stock, property, estate, and effects of said company; the transfer of shares; the duties and conduct of their officers and servants; touching the election and meeting of the directors, and all matters whatsoever which may appertain to the concerns of said company; said company is also hereby empowered to purchase, receive, and hold such real estate as may be necessary and convenient in
127 accomplishing the object for which this incorporation is granted; and may by their agents, surveyors, engineers, and servants enter upon such route or places to be designated by the directors, and approved by three commissioners to be appointed by the general assembly for that purpose, who shall have no interest in said railroad, after notice to the persons whose lands or estate may have been taken, and after hearing all objections which may by such persons be made to the location made by the directors, as the line, course, road, or way whereon to construct said railroad or way; and it shall be lawful for said company to enter upon and use all such lands and real estate as may be necessary for them, in the manner and for the purposes set forth in the first section hereof; and said company shall be holden to pay all damages that may arise to any person or persons; and if the person or persons to whom damage may so arise and said company cannot agree as to the amount of such damages, it shall be the duty of said company to apply to the superior court of the county in which the real estate damage may be situated, and thereupon said superior court shall appoint three disinterested and judicious freeholders to assess the amount of such damage; and said freeholders after being sworn shall give notice to the parties of the time and place of their meeting on the business of their appointment, at which time and place they shall proceed to hear the parties, and to inquire into the extent of the damages, and shall assess just damages to the person or persons whose real estate may be taken or injured; taking into consideration any benefit or advantage which may result to such person or persons from said railroad; which assessment shall be in writing under the hands of said freeholders, and the same shall be returned to the clerk of said superior court, who shall record it; and when so returned and recorded such assessment shall have the effect of a judgment; and execution may issue at the end of sixty days from the time when
128 such assessment shall be so returned in favor of the persons respectively to whom damage may be assessed for the amounts to them assessed.

Provided, that said railroad shall not be worked upon or opened across the land of any person until the damages assessed to such persons shall have been paid or secured to be paid to his satisfaction; and that the said damages shall be paid within sixty days after the same shall have been finally determined.

SEC. 8. That when the lands or other property or estate of any *femme covert,* infant, or person *non compos mentis,* shall be necessary for the construction of said railroad, the husband of such *femme covert,* and the guardian of such infant, or *non compos mentis,* may release all damages for any lands or estate taken and appropriated as aforesaid, as they might do if the same were holden in their own right respectively.

SEC. 9. That said company is hereby authorized to construct, erect, build, make, and use a single, double, or treble railroad or way, of suitable width and dimensions, to be determined by the Directors of said company, on the line or course by them designated, and shall have power to regulate the time and manner in which goods and passengers shall be transported, taken, and carried on the same; and shall have power to erect and maintain toll houses, and other buildings for the accommodation of their concerns, as they may deem suitable for their interests.

SEC. 10. That whenever it shall be necessary for the construction of their single, double, or treble railroad or way to intersect or cross any stream of water or water-course, or any road or highway, it shall be lawful for said company to construct said railroad across or upon the same, but the said company shall restore said stream, or water-course, or road, or highway, thus intersected, to its former state, or in a sufficient manner not to impair its usefulness;
129 and said railroad corporation shall constantly maintain in good repair all bridges, with their abutments and embankments, which they may construct for the purpose of constructing their railroad over any highway or private way, or for constructing such highway or private way over said railroad.

SEC. 11. That it shall be lawful for the company hereby incorporated, from time to time to fix, regulate, and receive the tolls and charges by them to be received for transportation of persons or property on the single, double, or treble railroad aforesaid, hereby authorized to be constructed, erected, built and used, or upon any part thereof.

Provided, that the rates of said tolls and charges shall be fixed annually by said company, in the month of March, and shall immediately thereafter be published in at least one newspaper printed in each of the cities of Hartford and New Haven; and the rates aforesaid shall not be raised at any other time during the year.

SEC. 12. That if any person shall wilfully do, or cause to be done, any act or acts whatever, whereby any building, construction, or work of said company, or any engine, machine, or structure, or any matter or things appertaining to the same shall be stopped, obstructed, impaired, weakened, injured, or destroyed, the person or persons so offending shall be deemed guilty of a misdemeanor, and shall forfeit and pay to said corporation double the amount of damages sustained by means of such offense or injury, to be recovered in the name of said corporation, with costs of suit, by action of debt.

SEC. 13. That the directors of said company may require the payment of the sum or sums subscribed to the capital stock of said

company at such times, and in such proportions, and upon such conditions as they may deem fit; and in case any stockholder shall refuse or neglect to make payment, pursuant to the requisition of the board of directors, the stock of such stockholder, or so much thereof
130 as shall be necessary, may be sold by the directors of said corporation at public auction after the lapse of six months from the time when the payment became due; and all surplus money, the avails of such sale, after deducting the payments due and interest thereon, and the necessary expenses of the sale, shall be paid over to such negligent stockholder.

SEC. 14. That the capital stock of said corporation shall be and remain free from taxation until the profit collected by said railroad corporation shall be sufficient to afford a dividend of five per cent. per annum on the capital stock.

SEC. 15. If said company shall not expend the sum of one hundred thousand dollars upon said road or way within four years, or if they shall not construct and complete and put in operation a single, double, or treble railroad or way as hereinbefore authorized, within six years after the passage of this act, then the rights, privileges, and powers of said corporation shall be null and void; and the legislature shall have the power at all times to authorize the construction of other railroads to be connected with or to cross the route of this railroad.

SEC. 16. That said corporation shall report annually to the legislature of this state the amount of their expenditures on said railroad, and the income and profits accruing thereon; which report shall be made by the president and secretary of said corporation under oath.

(Passed by Conn. General Assembly, May, 1835.)

Resolved by this Assembly, That William H. Ellis, Henry L. Dekoven and Nathaniel Stevens be and they are hereby appointed commissioners under and for the purposes specified in the seventh section of the act incorporating the Hartford and New Haven Railroad Company.

131 *Private Laws of Conn. Vol.* I, *p.* 1006.

Resolve Incorporating The Hartford and Springfield Railroad Company. Passed, May, 1835.

SECTION 1. Resolved by this assembly, That the persons named in the first section of the act incorporating the Hartford and New Haven Railroad Company, together with such other persons as they may associate with them for that purpose, be, and they are hereby, constituted a body politic and corporate by the name of "The Hartford and Springfield Railroad Company," and by that name to sue and be sued, plead and be impleaded, in any court of this state, to make and have a common seal, and the same to break, alter, or renew at pleasure, and said company are hereby vested with all powers, privileges, and immunities which are or may be

necessary to carry into effect the purposes and objects of this act. And said company is hereby authorized and empowered to locate, construct, and finally complete a single, double, or treble railroad or way, from some suitable point in the city of Hartford by the most direct and feasible route to the northern line of the state of Connecticut, thence to Springfield in the state of Massachusetts, provided the company shall obtain leave from the legislature of Massachusetts so to extend the same, and to transport, take, and carry property and persons upon said railroad or way by the power and force of steam or animals, or any mechanical or other power or any combination of them which said company may choose to apply. And for the purpose of constructing said railroad or way the said company are hereby authorized to lay out their road, not exceeding six rods wide through the whole length, and for the purpose of cuttings and embankments and for obtaining stone and gravel, may take as much more land as may be necessary for the proper construction and security of said road: Provided, that all damages that may be occasioned to any person or corporation by the taking of such lands or materials for the purpose aforesaid shall
132 be paid for by said company in manner hereinafter provided.

SEC. 2. That the capital stock of said company shall be five hundred thousand dollars, with the privilege of increasing the same to one million of dollars, and to be divided into shares of one hundred dollars each, which shares shall be deemed personal property and be transferred in such manner as the by-laws of said corporation shall direct.

SEC. 3. That James Brewster, John Babcock, John S. Mitchell, Joel Root, and such other persons as they shall associate with them for that purpose, not exceeding ten in the whole, said Brewster, Babcock, Mitchell, and Root, or a majority of them, shall open books to receive subscriptions to the capital stock of said company at such times and places as they or a majority of them may appoint, and shall give such notice of the times and places of opening said books as they may deem reasonable, and shall receive said subscriptions under such regulations as they may adopt for that purpose. And if more than five thousand shares of stock shall be subscribed they shall have the power to make the shares so subscribed the capital stock of the company. Provided they shall not exceed ten thousand shares, and in case the subscriptions shall exceed ten thousand shares the same shall be reduced and apportioned in such manner as may be deemed most beneficial to the corporation.

SEC. 4. That the immediate government and direction of the affairs of the company shall be vested in a board of seven directors, who shall be chosen by the stockholders of said company in the manner hereinafter provided, and shall hold their offices until others are duly elected and qualified to take their places as directors, and the said directors, a majority of whom shall be a quorum for the transaction of business, shall elect one of their number to be president of the board who shall also be president of said company.

They shall also choose a clerk who shall be sworn to a faith-
133 ful discharge of his duty, and a treasurer who shall give bonds with surety to said company, in such sum as the said directors may require for the faithful discharge of his trust.

SEC. 5. That the persons authorized by the third section of this act to open the books for subscriptions to the capital stock are hereby authorized after the books of subscription to the capital stock of said company are closed, to call the first meeting of the stockholders of said company in such way and at such time and place as they may appoint, for the choice of directors of said company; and in all meetings of the stockholders of said company each share shall entitle the holder thereof to one vote, which vote may be given by said stockholder in person or by lawful proxy, and the annual meeting of the stockholders of said company for the choice of directors shall be holden at such time and place and upon such notice as the said company in their by-laws may prescribe.

SEC. 6. That in case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, said company shall not for that cause be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the directors of said company.

SEC. 7. That the directors shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper, touching the disposition and management of the stock, property, estate, and effects of said company, not contrary to this charter or the laws of this state or of the United States; the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors, and all matters whatsoever which may appertain to the concerns of said company. Said company is also hereby empowered to purchase, receive, and hold such real estate as may be necessary and convenient in accomplishing the object for which this incorporation is granted, and may by their agents, surveyors, engineers, and servants,
134 enter upon such route or plans to be designated by the directors and approved by three commissioners to be appointed by the general assembly for that purpose, who shall have no interest in said railroad after notice to the persons whose lands may have been taken, and after hearing all objections which may by such persons be made to the location, made by the said directors, as to the time, course, road, or way, whereon to construct said railroad or way. And it shall be lawful for said company to enter upon and use all such lands and real estate as may be necessary for them, in the manner and for the purposes set forth in the first section hereof, and said company shall be holden to pay all damages that may arise to any person or persons; and if the person or persons to whom damages may so arise and said company cannot agree as to the amount of such damages, it shall be the duty of said company to apply to the superior court of the county in which the real estate damaged may be situated, and to cause notice to be given to the adverse party of such application, and thereupon said superior court shall appoint three disinterested and judicious freeholders to

assess the amount of such damages, and said freeholders after being sworn shall give notice to the parties of the time and place of their meeting, on the business of their appointment, at which time and place they shall proceed to hear the parties and to enquire into the extent of the damages, and shall assess just damages to the person or persons whose real estate may be taken or injured which assessment shall be in writing under the hands of said freeholders, and the same shall be returned to the clerk of said superior court who shall record it, and when so returned and recorded such assessment shall have the effect of a judgment, and execution may issue at the end of sixty days from the time when such assessment shall be so returned in favor of the persons respectively to whom damages may be assessed for the amount so to them assessed; Provided, that said railroad shall not be opened across the lands of
135 any person until the damages assessed to such persons shall have been paid or secured to be paid to his satisfaction, and that the said damages shall be so paid within sixty days after the same shall have been finally determined.

SEC. 8. That when the lands or other property or estate of any *femme covert*, infant, or person *non compos mentis* shall be necessary for the construction of said railroad, the husband of such *femme covert*, and the guardian of such infant or person *non compos mentis* may release all such damages for any lands or estate, taken and appropriated as aforesaid, as they might do if the same were holden in their own right respectively.

SEC. 9. That said company is hereby authorized to construct, erect, build, make, and use, a single, double, or treble railroad or way of suitable width and dimensions to be determined by the directors of said company on the line or course by them designated, and shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on the same, and shall have power to erect and maintain toll-houses and other buildings for the accommodation of their concerns as they may deem suitable for their interests.

SEC. 10. That whenever it shall be necessary for the construction of their single, double, or treble railroad or way to intersect or cross any stream of water or watercourse, or any road or highway, it shall be lawful for said company to construct such railroad across or upon the same, but the said company shall restore the said stream or watercourse, or road, or highway thus intersected to its former state, or in sufficient manner not to impair its usefulness, and in all cases when any road or public highway is so located that said railroad cannot be judiciously laid out and constructed across or upon the same without interfering therewith in such case or cases, said corporation may, by their engineer, cause such road or roads to be changed or altered, in such manner that said rail-
136 road may be made on the best site of ground for that purpose; Provided said corporation shall put such road in as good repair at the time of changing or altering the same.

SEC. 11. That it shall be lawful for the company hereby incorporated, from time to time to fix, regulate, and receive the tolls and

charges by them to be received for transportation of persons or property, on their single, double, or treble railroad or way aforesaid, hereby authorized to be constructed, erected, built, or used, or upon any part thereof.

SEC. 12. That if any person shall wilfully do, or cause to be done, any act or acts whatever, whereby any building, construction, or works of said company, or any engine, machine, or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened, injured, or destroyed, the person or persons so offending shall be deemed guilty of a misdemeanor, and shall forfeit and pay to said corporation double the amount of damages sustained by means of such offence or injury, to be recovered in the name of said corporation, with costs of suit, by action of debt.

SEC. 13. That the directors of said company may require the payment of the sum or sums subscribed to the capital stock of said company, at such times, and in such proportions, and upon such conditions as they may deem fit; and in case any stockholder shall refuse or neglect to make payment, pursuant to the requisition of the board of directors, the stock of such stockholder, or so much thereof as shall be necessary, may be sold by the directors of said corporation at public auction, after the lapse of six months from the time when the payment became due; and the surplus money, the avails of such sale, after deducting the payments due and interest thereon, and the necessary expenses of the sale, shall be paid over to such negligent stockholder.

SEC. 14. That the legislature may authorize any com-
137 pany to enter with another railroad, at any point of said Hartford and Springfield railroad, paying for the right of using the same, or any part thereof, such a rate of toll as the directors of the said Hartford and Springfield railroad company may from time to time prescribe, and complying with such rules and regulations as may be established by said Hartford and Springfield railroad company.

SEC. 15. That said corporation shall not be allowed to construct said railroad or any part thereof within the limits of the city of Hartford, except under the direction of the court of common council of said city, nor shall steam power be used on any part of said railroad, within said city, without the permission of said court of common council.

SEC. 16. That should it become necessary to erect a bridge across Connecticut river, said company are hereby authorized and empowered to erect said bridge, for the sole and exclusive accommodation of the travel on the said railroad, and it shall not be lawful for said company to permit the passing of the said bridge by carriages of any description other than those which are adapted to the traveling on the said railroad, nor by horses not attached to such railroad carriages, nor by persons on foot, nor for any other travel whatever, except for such persons, carriages, or horses as may be employed in the immediate service of the said company, and a suitable draw shall be erected in said bridge by said company, and

placed over the channel of said river at the west end of said bridge, not less than thirty feet wide, and all vessels shall be permitted at all times to pass said draw without payment of toll; and suitable persons shall be provided by said company to open and shut said draw, on due notice of the approach of said vessels.

SEC. 17. That if said company shall not expend the sum of seventy thousand dollars upon said railroad or way, within four
138 years, or if they shall not contract and complete and put in operation a single, double, or treble railroad or way, as hereinbefore authorized, within six years after the passage of this act, then the rights, privileges, and powers of said corporation shall be null and void.

SEC. 18. That the capital stock of said company shall be assessed at its just value in money, and taxed at the same rate as personal estate.

SEC. 19. It is hereby provided, that nothing herein contained shall be construed to prejudice or impair any of the rights now vested in the Enfield bridge company.

SEC. 20. Resolved further, that this act may be altered or amended at the pleasure of the general assembly.

(Passed by Conn. General Assembly, May, 1835.)

Resolved by this Assembly, That Joel W. White, Orin Holt and William Field, Esqrs. be and they are hereby appointed commissioners under and for the purposes specified in the seventh section of the act incorporating the Hartford and Springfield Railroad Company.

139 *Private Laws of Conn., Vol. IV., P.* 917.

Concerning the Hartford and Springfield Railroad Corporation Incorporated by Massachusetts and Connecticut. Passed 1840.

Resolved by this Assembly:

SECTION 1. That the persons who shall become stockholders in the "Hartford and Springfield Railroad Corporation," incorporated by the legislature of the State of Massachusetts in the year one thousand eight hundred and thirty-nine, shall be stockholders of the "Hartford and Springfield Railroad Company," incorporated by the legislature of this State, in the year 1835, together with such persons as shall become stockholders of the said last mentioned corporation; and when the stockholders shall, by vote, have assented thereto, the said corporation shall become united into one corporation, by the name of the Hartford and Springfield Railroad Corporation, with a capital not exceeding the amount of the joint capital of both corporations; and all the tolls, franchises, rights, powers, privileges, and property granted, or to be granted, acquired, or to be acquired, under the authority of the State of Massachusetts, or of this State, shall be held and enjoyed by all the stockholders, in proportion to the number of shares in either or both of said corporations.

SEC. 2. After the said union shall be perfected, the said stockholders shall hold their meetings, make their by-laws, appoint their officers, and transact all their business as one corporation. Provided, that one or more of the officers of said corporation shall be resident in this State and one or more of them in the State of Massachusetts, on whom process against said corporation may be legally served in either State, and said corporation shall be held to answer within the jurisdiction where such service shall be made, and the process is returnable.

SEC. 3. The share or shares of any stockholder in said corporation shall be liable to attachment and to be taken on
140 execution in the State where such stockholder shall reside at the time of the service of such process. Provided, the laws of such State authorize the attachment and taking on execution of such property, and an attested copy of such writ or execution and of the return of the officer thereon shall, at the time of such service, be left with the clerk or a director of said corporation, or at his usual place of abode by the officer making the service.

SEC. 4. The said corporation shall so make out and keep an account of the expenditures on said road from its commencement to its completion, as clearly to exhibit what portion thereof belongs to that part of said road situated in Massachusetts and what portion to that part in Connecticut. And two commissioners shall be appointed, one by the governor of each State, to hold their offices for the term of four years and to be reasonably compensated for their services by said corporation, who shall ascertain what proportion of expenditures on said road, and of the other expenses attending its construction, maintenance and use, also what proportion of the receipts and profits of said railroad shall properly appertain and belong to the portions of said road in each State respectively. And any annual report required to be made by the directors to the legislature of this State shall be approved by the said commissioners.

SEC. 5. The said corporation, so far as their road is situated in Connecticut, shall be subject to the general laws of this state to the same extent as if their road were wholly therein.

SEC. 6. The several sections and provisions of this resolution shall not take effect until the same shall have been accepted by the stockholders of each of said corporations at meetings duly called for the purpose, nor until said stockholders last mentioned,
141 also in legal meetings duly warned for that purpose, shall have accepted similar provisions contained in the said act of the state of Massachusetts, nor until the same shall have been accepted by the stockholders of said united corporation at a meeting called for the purpose, at which meeting they may ratify and confirm all or any of their former doings when separately convened and adopt them as the acts and doings of said united corporation.

(Passed by Conn. General Assembly, May, 1840.)

Resolved: That Eliphalet Averill, Harvey Bissell and Erastus Holcomb be and they are hereby appointed commissioners on the Hartford and Springfield Railroad, for the year ensuing.

142 *Special Laws of Mass.*, 1844. *Chap.* 28.

(Passed Feb. 23, 1844.)

An Act in Addition to an Act to Incorporate the Hartford and Springfield Railroad Corporation.

Be it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, as follows:

SECT. 1. The time allowed by the statute of one thousand eight hundred and thirty-nine, chapter one hundred and one, and the statute of one thousand eight hundred and forty-one, chapter seventy-two, for the Hartford and Springfield Railroad Corporation to file, with the county commissioners of the county of Hampden, the location of the route of their railroad, is hereby extended for one year from and after the fifth day of April next; and the time allowed by said statutes, for the completion of said road, is hereby further extended for two years, from and after the said fifth day of April next; and the filing of the location of said road, in the manner, and within the time herein prescribed, shall be as valid and effectual as if the same had been filed with the county commissioners, according to the provisions of the first-mentioned statute: provided, however, that the provisions of this section shall not apply to that portion of the said railroad between the Western Railroad and Chicopee river.

SECT. 2. The persons who now are, or may hereafter be, stockholders of the Hartford and New Haven Railroad Company, a corporation established by an act of the legislature of the state of Connecticut, shall be stockholders of this corporation, together with such persons as now are, or may hereafter become, stockholders of this corporation; and when the stockholders shall, by vote, have assented thereto, the said corporations shall become united in one corporation, by the name of the New Haven and Springfield Railroad Company, with a capital not exceeding the amount of the joint capital of both corporations, and all tolls, franchises,
143 rights, powers, privileges, and property granted, or to be granted, acquired, or to be acquired, under the authority of the state of Connecticut, or of this State, shall be held and enjoyed by all the stockholders, in proportion to their number of shares, in either or both of said corporations.

SECT. 3. After the said union shall be perfected, the said stockholders shall hold their meetings, make their by-laws, appoint their officers, and transact all their business as one corporation: provided, that one or more of the officers of said corporation shall be resident in this commonwealth, and one or more of them in the state of Connecticut, on whom process against said corporation may be legally served in either state; and said corporation shall be held to answer within the jurisdiction where such service shall be made and the process is returnable.

SECT. 4. The share, or shares, of any stockholder in said corporation, shall be liable to attachment, and to be taken on execution, in the state where such stockholder shall reside at the time of the service of such process: provided, the laws of such state authorize the attachment and taking on execution of such property; and an attested copy of such writ, or execution, and of the officer's return thereon, shall, at the time of such service, be left with the clerk, or a director of said corporation, or at his usual place of abode, by the officer making the service.

SECT. 5. The said corporation shall so make out and keep an account of the expenditures on said road, from its commencement to its completion, as clearly to exhibit what portion thereof belongs to that part of said road situated in Massachusetts, and what portion to that part in Connecticut; and two commissioners shall be appointed, one by the governor of each state, to hold their offices for the term of four years, and to be reasonably compensated for their services by said corporation, who shall ascertain what
144 proportion of the expenditures on said road, and of the other expenses attending its construction, maintenance, and also what proportion of the receipts and profits of said railroad shall properly appertain and belong to the portions of said road in each state respectively; and the annual reports required to be made by the directors, to the Legislature of this Commonwealth, shall show the amounts of expenditures, receipts, and profits, as aforesaid, which belong to the parts of said road, situated in said two states respectively; and said reports shall be approved by said commissioners.

SECT. 6. The said corporation, so far as their road is situated in Massachusetts, shall be subject to the general laws of this State to the same extent as if their road were wholly therein.

SECT. 7. The second, third, fourth and fifth sections of this act shall not take effect, until the legislature of the state of Connecticut shall have enacted provisions, similar to those contained in said sections, nor until the provisions so enacted, shall have been accepted by the stockholders of both of said corporations, at meetings duly called for the purpose, nor until the same have been accepted by the stockholders of said united corporation, at a meeting called for the purpose, and at which meeting they may ratify and confirm all or any of their former doings, and adopt them as the acts and doings of said united corporation. (February 23, 1844.) Add. acts, 1845, ch. 42; 1847, ch. 244.

145 *Private Laws of Conn., Vol. IX, p.* 901.

Altering the Charter of the Hartford and New Haven Railroad Company and Changing Name to "The New Haven, Hartford and Springfield Railroad Company." Passed 1844.

Resolved by this assembly, 1st. That the Hartford and New Haven Railroad Company shall be allowed the further time of two years from and after the rising of this assembly, within which to

complete the extension of their road to Springfield and put the same in operation.

Resolved, 2d. That the resolutions of this assembly, passed May session, 1840, providing for the union of the Hartford and Springfield Railroad Company in Connecticut with the Hartford and Springfield Corporation in Massachusetts, shall be extended and be applied to the Hartford and New Haven Railroad Company, and that when the Hartford and Springfield Railroad Corporation, in Massachusetts, shall be united with the Hartford and New Haven Railroad Company, the united company shall be called The New Haven, Hartford and Springfield Railroad Company, and by that name shall enjoy all the privileges and be subject to all the liabilities of such company. Provided, that nothing herein contained shall be construed to exempt the capital stock of the Hartford and Springfield Railroad Company from taxation, as is provided by section eighteen of the act incorporating the same, passed May session, 1835.

Resolved, 3d. That the Hartford and New Haven Railroad Company are hereby authorized to construct a branch at Hartford, to form a connection between their road and Connecticut River, and also a branch between their tracks easterly of Imlay's mill and westerly of their depot at Hartford, and thereby to have more convenient access to their said depot; said branches to be located and constructed according to the provisions of their charter.

Resolved, 4th. That whenever any person or corporation
146 is interested in any stream or water-course which said company has intersected, changed or crossed, or in any road or highway which said company has intersected, crossed or changed, and such person or corporation claims that said stream or water-course or said road or highway is not by said company restored to its former state, or in sufficient manner not to impair its usefulness, or that any road or highway which has been changed or altered is not put in as good repair as at the time of changing or altering the same, then, in all such cases, application may be made by said railroad company, or by such person or corporation to the superior court or any judge thereof, in vacation, and thereupon, after due notice given, said court or judge shall appoint three disinterested persons, who shall be sworn and who shall hear and determine said claim, and they shall have power to determine whether anything further shall be done by said company to comply with their charter; and their certificate under oath that said company have complied with their charter in the matters aforesaid, shall be final and conclusive upon the parties.

Resolved, 5th. That these resolutions shall be subject to alteration, amendment or repeal at the pleasure of the general assembly.

Resolved further, 6th. That the charter of the Hartford and New Haven Railroad Company, and all the resolutions altering or amending the same, and all resolutions of the general assembly of this State, conferring any powers or privileges on said company, be and the same hereby are declared and made subject to be altered, amended or repealed at the pleasure of the general assembly; and

the foregoing resolutions shall not take effect or be considered valid until the said railroad company, by a vote of their directors, shall give their assent to this resolution and every part thereof, and give public notice of their said assent, by filing a copy of said vote,
147 duly authenticated, in the office of the secretary of this State, on or before the first day of July, 1844.

(Passed by Conn. General Assembly, May, 1844.)

Resolved by this assembly, That John B. Robertson, Samuel C. Johnson and William Field, be and they are hereby appointed commissioners on the Hartford and New Haven Railroad for the year ensuing.

148 *Special Laws of Conn.*, 1889, *Chap.* 430. *Approved June* 14, 1889.

Amending the Charter of the New York, New Haven & Hartford Railroad Company.

Resolved by this assembly:

SECTION 1. The New York, New Haven & Hartford Railroad Company is hereby authorized to increase its capital stock to such extent as shall be required, from time to time, either by purchase or payment, to take up its funded and floating debt, as the same shall be at the date of the acceptance of this amendment, and to make permanent additions and improvements in the property of the company and of its leased lines. But no issue of stock for the aforesaid purposes shall be made except upon the payment of one hundred dollars in cash for each share so to be issued, and the cost of such additions and improvements shall be verified by sworn certificate of an engineer approved by the board of railroad commissioners, and the certificates shall be filed with said board.

SEC. 2. Said company may also increase its capital stock for the purpose of exchanging the same, up to and during the year 1899, for the shares of the capital stock and for the obligations of any railroad company whose property it may hold by virtue of a lease for a term as long as fifty years, and in case of roads to be leased hereafter, whose railroad is located in whole or in part within this state. But no such exchange of new stock of the company for the stock or obligations of a company whose property may be so held by it shall be made until the terms of said exchange, in the case of each and all such companies, are approved by a committee consisting of the state treasurer, state comptroller, and a counsellor at law of at least ten years' practice, to be appointed by the governor upon the application of the New York, New Haven & Hartford Railroad Company, and twenty days' notice of such application and of the proposed exchange and its terms, shall in all cases be given
149 the board of railroad commissioners. And said railroad commissioners are hereby authorized to appear upon the hearing of such applications and of any of them, and to make any and all ob-

jections and suggestions relative to such exchange as may seem proper to them in the interest of any party concerned or of the public. And such committee is authorized to alter, amend, and change any and all proposed methods and terms of exchange, and to approve the same as they shall amend them; and after said plan and method in any case is approved by such committee, the holder of any stock or obligations proposed to be exchanged, and the said New York, New Haven & Hartford Railroad Company are hereby authorized to make such exchange. But the amount of new stock to be issued in exchange for the stock of said leased lines, or by purchase of said stock of said leased lines, as hereinafter provided, shall not exceed the whole amount of capital stock of said lines now issued under their charters, or now authorized by law.

SEC. 3. In case the said New York, New Haven & Hartford Railroad Company shall retire all of the capital stock of any such leased line, by purchase or exchange, the executive officers of said respective companies shall certify the same by certificate to be filed in the office of the state secretary, and the said stock of said leased line and all its franchises shall thereupon be and be deemed to be forever transferred to and merged in the stock and franchises of the said New York, New Haven & Hartford Railroad Company; and the notes, bonds, and debts of said leased lines, so far as they are not retired by said New York, New Haven & Hartford Railroad Company, shall be binding upon the said New York, New Haven & Hartford Railroad Company, and the duties, obligations, and privileges of said leased lines, as given and expressed by their respective charters, shall be and remain upon and with the said New York, New Haven & Hartford Railroad Company. Until the entire capital stock of any of said leased lines is so obtained by said New York, New Haven & Hartford Railroad Company by purchase or exchange of stock, the shares of capital stock of any of said leased lines which are so obtained shall remain in the control of said New York, New Haven & Hartford Railroad Company as its property, the said stock to be used for all purposes of income, corporate organization, management, and franchise; but for all other purposes, including purposes of taxation, it shall be deemed to be transferred to and merged into the stock of the New York, New Haven & Hartford Railroad Company, subject, nevertheless, to the right of any proper court to control the undue exercise of such power of voting on said stock for the protection of other stockholders, and the said obligations shall remain as good and valid obligations of said several leased lines under the terms of the respective leases. The said New York, New Haven & Hartford Railroad Company may pay at maturity the obligations of said leased line companies, and may also, until and including the year 1899, purchase the obligations and shares of capital stock of said leased lines; and for the aforesaid purposes may issue capital stock, each share of such new capital stock to be paid for by one hundred dollars in cash. And such obligations of said leased lines so paid by the New York, New Haven & Hartford Railroad Company shall be and remain a valid obligation against said leased line company under the terms of the

lease. In determining whether at any time proper and equal facilities are afforded to all connecting roads agreeable to the provisions of section seven of the act authorizing the formation of the New York, New Haven & Hartford Railroad Company, printed in the Public Acts of 1871, (p. 713), in so much of said section as provides that said company shall ticket passengers, check baggage, way-bill freight, and give equal facilities for the convenient transfer of passengers, baggage, and freight to and from all connecting railroads, every railroad now or hereafter connecting with the
151 railroad of said company, and whose stock and franchises shall hereafter be merged into the stock and franchises of the New York, New Haven & Hartford Railroad Company under the provisions of this act shall be deemed a connecting railroad within the meaning of said act.

SEC. 4. The new capital stock hereby authorized, excepting that which is used and exchanged for capital stock or obligations of leased lines, shall be first offered to the stockholders for subscription in proportion to the number of shares held at the time of increase, excepting that the directors may arrange for the disposition of fractional shares; and stockholders holding shares in any trust capacity may subscribe for new stock, unless expressly prohibited by the terms of their trust. Such shares of new stock as are not taken by shareholders may be sold at public auction for the benefit of the company, but no shares shall be sold at less than par.

SEC. 5. The entire amount of capital stock hereby authorized shall not exceed thirty-five million dollars.

SEC. 6. This amendment may be accepted by a two-thirds vote at a stockholders' meeting held for the purpose.

Approved, June 14, 1889.

152 [*R. I. Acts & Resolves*, 1832, p. 67.]

An Act to Incorporate the New York, Providence and Boston Rail Road Company.

SECTION 1. Be it enacted, etc.:

That Oliver D. Wells, Samuel Whittemore, John Y. Gray, Robert P. Bell, Joseph Goddard, Isaac Champlain, Charles Perry, John H. Cross, Lyndon Taylor, Paul Babcock, Jr., George W. Gavitt, George Wells, Jesse L. Moss, Peter Crary, Courtland Palmer, John S. Crary, S. F. Dennison, C. H. Phelps, Gurdon Trumbull and their associates, successors and assigns, be, and they hereby are made a corporation, by the name of the New York, Providence and Boston Railroad Company; and they shall be capable in law to sue and be sued to final judgment and execution; plead and be impleaded, defend and be defended against, in any court of record, or in any other place whatever; to make, have and use a common seal, and the same to break, renew or alter at pleasure; and shall be, and are hereby vested with all the powers, privileges and immunities, which are or may be necessary to carry into effect the purposes and objects of this act, as hereafter set forth. And the said corporation are

hereby authorized and empowered to locate, lay out and construct and finally complete a rail road; commencing in the city of Providence, thence to the line of the state of Connecticut, on Pawcatuck river in Westerly; and such lateral branches of said road to any part of the waters of Narragansett bay, or to any factories or villages, as the said company shall deem expedient, in such manner and form, as they shall deem expedient. And for this purpose the said corporation are authorized to lay out their road, not exceeding six rods wide through the whole length; and for the purpose of cutting embankments, and obtaining stone and gravel, may take as much more land as may be necessary, for the proper construction and security of said road; provided, that all damages that
153 may be occasioned to any person, company or corporation, by taking of such land or materials for the purposes aforesaid, shall be paid for by said corporation, in manner hereinafter provided.

SEC. 2. And be it further enacted, That the capital stock of said corporation shall consist of twelve thousand shares, of one hundred dollars each. And the immediate government and direction of the affairs of said corporation, shall be vested in nine directors, who shall be chosen by the members of the corporation, in the manner hereafter provided; and shall hold their offices for one year, and until others shall be duly elected and qualified to take their places as directors; a majority of whom shall form a quorum for the transaction of business; shall elect one of their own number as president of the board, who shall also be president of the corporation. And said directors shall have authority to choose a clerk, who shall be sworn to the faithful discharge of his duty; and a treasurer, who shall give bond to the corporation, with sureties to the satisfaction of the directors, in a sum not less than twenty thousand dollars, for the faithful discharge of his trust.

SEC. 3. And be it further enacted, That the president and directors for the time being, are hereby authorized and empowered, by themselves or their agents, to exercise all the powers herein granted to the corporation, for the purpose of locating, constructing and completing said railroad; and all such other powers and authority for the management of the affairs of the corporation not heretofore granted, as may be necessary and proper to carry into effect the objects of this grant. To purchase and hold land, materials, and other necessary things, in the name of the corporation for the use of said road, and so far as the same may be necessary therefor; To make such equal assessments from time to time, on all the shares in said corporation, as they may deem expedient and necessary, in the progress and execution of the work; and direct the same
154 to be paid to the treasurer of the corporation; and the treasurer shall give notice of all such assessments; and in case any stockholder shall neglect to pay his assessment for the space of thirty days after notice by the treasurer of said corporation, the directors may order the treasurer to sell such share or shares at public auction, after giving not less than thirty days' notice in one newspaper at least, published in this State, to the highest bidder, and the same

be transferred to the purchaser; and such delinquent stockholder shall be entitled to the overplus, if his share or shares shall sell for more than the assessment due, with the interest and cost of sale; provided, however, that no assessment shall be laid upon any shares in said corporation, of a greater amount in the whole, than one hundred dollars on each share.

SEC. 4. And be it further enacted, That the said corporation shall have power to make, ordain and establish, all such by-laws, rules and regulations for their own government, and for the management of their property and concerns, as they shall deem expedient and necessary, to accomplish the designs and purposes, and to carry into effect the provisions of this act, and for the well ordering, regulating and securing the interest and affairs of the corporation; provided the same be not repugnant to the laws of this state.

SEC. 5. And be it further enacted, That a toll be, and hereby is granted and established for the sole benefit of said corporation, on all passengers, and property of all descriptions, which may be conveyed or transported upon said road; at such rates per mile as may be agreed upon and established from time to time, by the directors of said corporation. The transportation of persons and property, the construction of wheels, the form of cars and carriages, the weight of loads, and all other matters and things in relation to the use of said road, shall be in conformity to such rules, regulations and provisions as the directors shall from time to time prescribe and direct; and said road may be used by any persons who may comply with such rules and regulations: Provided, however, that if at the expiration of four years from and after the completion of said road, the net income or receipts from tolls or other profits shall have amounted to more than twelve per cent. per annum upon the whole cost of the road and appurtenances, the general assembly may take measures to alter and reduce the rate of tolls and other profits, in such manner as to take off the overplus for the next four years; calculating the amount of transportation upon the road to be the same as for the four preceding years; and at the expiration of every four years thereafter, the same proceedings may be had; and the rate of tolls may be raised in case the net receipts shall have been less than twelve per cent. during the preceding four years.

SEC. 6. And be it further enacted, That the directors of said corporation for the time being, are hereby authorized to erect toll houses, to establish gates, appoint toll gatherers, and demand and collect toll upon the road when completed, and upon such parts thereof as shall from time to time, be completed: and they shall from year to year, make a report to the general assembly, of their acts and doings under the provisions of this act. And the books of said corporation shall be open for the inspection of a committee of the general assembly at their pleasure. And it shall be the duty of the treasurer of said corporation, when so required by the general assembly, to render an account of the receipts and expenditures of said railroad under oath.

SEC. 7. And be it further enacted, That whenever said corporation shall have located said railroad, or any part thereof, they may make

report thereof to the court of common pleas, then to be holden within and for any county within which said location is made, at any term thereof; wherein they shall particularly describe the bearings of the intended route, or any section thereof so located; and the names of the owners of the land through which the same may pass, so
156 far as they can be ascertained; which report so made, shall be placed on the files of said court, and notice given thereof to the owner or owners of the land embraced therein, if known, in such manner as the court shall direct, at the expense of said corporation. And said court shall thereupon appoint three discreet and disinterested freeholders of the said county, vacancies if any happen, to be filled by the court, to estimate all damages which any person or persons whose lands are described or mentioned in such report, shall sustain, provided such railroad, or any appendage or appurtenance thereof, be constructed thereon. And the said commissioners before they proceed to execute these duties, shall be sworn to a faithful and impartial discharge thereof; and they shall give reasonable notice, in such manner as said court shall direct, to all persons interested, to file their claims, if any they have, which have not been released to said corporation, with some one of said commissioners, or with the clerk of said court, within thirty days from the date of said notice. At the end of the term allowed for filing such claim for damages, the commissioners or a majority of them, having previously given notice to all parties interested, of the time and extent of the route to be examined, by publishing in one or more of the newspapers printed in the city of Providence, an advertisement thereof, in three successive papers, at least, shall pass on the premises so intended to be used by said corporation for the purposes aforesaid; and after hearing the partes interested, shall estimate all such damages as they shall think any person or persons, corporation or corporations shall sustain by the construction of said railroad, through his, her, or their land, over and above the benefits and advantages which the said commissioners shall judge may accrue to such person or persons, corporation or corporations, from the construction of the said railroad. And the said commissioners or a majority of them, shall make returns of their doings as soon as may be, to said court of common pleas:
157 and the said court shall thereupon, order the said report or the substance thereof, to be forthwith published in one or more of the newspapers printed in said Providence, three weeks successively, at the expense of the corporation. And if the said corporation or any person or persons interested, shall be dissatisfied with the estimate of said commissioners, application may be made by such dissatisfied party, at the next term of said court of common pleas after the return and acceptance of such report, and after its publication as aforesaid, for a jury to hear and finally determine upon the amount of damages to be assessed in the case complained of, which said jury shall be summoned by the sheriff, under the direction of the court, in the manner prescribed by law. And they shall be under oath according to provisions of law in such cases. And if the party injured in his or her estate, apply for such jury and fail to obtain such increase of damages, such party shall be liable for all

legal costs arising after the entry of such application for a jury; and such court shall enter judgment, and issue execution accordingly. And if said corporation apply for a jury, and fail to obtain diminution of damages, it shall in like manner be liable for costs; and said court may enter judgment and issue execution for such costs. And if within ninety days after the said corporation shall have entered upon the land of any person or persons, and commenced the constructing of said railroad it shall not pay or cause to be paid damages, if any, so assessed in manner aforesaid by such commissioners, or such jury, such person or persons on whose land operations are so commenced, may have an action of debt against said corporation, in any court proper to try the same, to recover such damages; and execution from whatever court the same may issue for damages assessed as aforesaid, and costs, shall be in common form, and may be levied upon the goods, estate and lands of said corporation; and the
158 report of said commissioners when accepted and recorded and not appealed from, in manner aforesaid or the verdict of a jury being returned and recorded, shall forever be a bar to any other action commenced for damages against said corporation, on account of the injury for which such damages were awarded, other than is herein provided. And said commissioners in all cases shall be allowed three dollars per day for their services.

Sec. 8. And be it further enacted, That when the lands or other property or estate, of any married woman, infant or person non compos mentis, shall be necessary for the construction of said railroad, the husband of such married woman, and the guardian of such infant or person non compos mentis, may release all damages, in relation to the lands or estates to be taken and appropriated as aforesaid, as they might do if the same were holden by them in their own rights respectively.

Sec. 9. And be it further enacted, That if any person shall wilfully, maliciously or wantonly, and contrary to law, obstruct the passage of any carriage on said rail road, or in any way spoil, injure or destroy said rail road, or any part thereof, or anything belonging thereto, or any materials or implements to be employed in the construction or for the use of said rail road, he, she or they, or any person or persons assisting, aiding or abetting in such trespass, shall forfeit and pay to said corporation for every such offense, treble such damages as shall be proved before the justice, court or jury, before whom the trial shall be had; to be sued for and recovered before any justice, or in any court proper to try the same, by the treasurer of the corporation or other officer whom they may direct, to the use of the same corporation: and such offender or offenders, shall be liable to indictment by the grand jury for the county, within which such trespass shall have been committed, for any offense or offenses contrary to the above provisions; and on conviction
159 thereof before any court of general session of the peace to be holden in said county, shall pay a fine not exceeding one hundred dollars and not less than thirty dollars, to the use of the state; or may be imprisoned a term not exceeding one year, at the discretion of the court before whom the conviction may be had.

SEC. 10. And be it further enacted, That if the said rail road, in the course thereof shall cross any private way, the said corporation shall so construct said rail road, as not to obstruct the safe and convenient use of said private way; and if said rail road shall not be so constructed, the party aggrieved, shall be entitled to his action on the case in any court proper to try the same; and shall recover his reasonable damages for such injury. And if the said rail road shall in the course thereof, cross any canal, turnpike or highway, the said rail road shall be so constructed as not to impede, or obstruct the safe and convenient use of such canal, turnpike or other highway. And the said corporation shall have power to raise or lower such turnpike or highway, so that the said railroad if necessary, may conveniently pass under or over the same. And if the said corporation shall raise or lower any such turnpike or highway pursuant thereto, and shall not so raise or lower the same as to be satisfactory to the proprietors of such turnpike, or to the town council of the town or towns in which said highway may be situated, as the case may be, said proprietors or town council may require in writing of said corporation, such alteration or amendment, as they may think necessary. And if the said corporation shall refuse or unreasonably neglect to make the same, such proprietors or town council, as the case may be, may file their complaint with the court of general sessions of the peace for the county in which said turnpike or highway may be; and if said court shall adjudge that said alteration is reasonable and proper, they shall decree that the same be made by said corporation, and render judgment accordingly. And in case said corporation shall neglect to comply with said judgment within the time prescribed by said court, the said proprietors or town council, as the case may be, may proceed to make such alterations or amendment; and may institute and prosecute to final judgment and execution, in any court proper to try the same, any action of the case against said corporation; and shall therein recover a reasonable indemnity in damages, for all charges, disbursements, labor and services, occasioned by making such alterations and amendments, with costs of suit.

SEC. 11. And be it further enacted, That in all proceedings, whether in law or equity, in which said corporation shall be a party, the leaving an attested copy of the writ, summons or other process with any director of said corporation residing in this state or with the treasurer or agent of said corporation, or at their usual place of business in this state, or either of them, shall be deemed a sufficient service thereof; and all executions that shall issue against said corporation may be levied on the property of said corporation of every description; or in such other manner as the general assembly may hereafter prescribe, for the service of process, or levying of execution against said corporation.

SEC. 12. And be it further enacted, That the annual meeting of the members of the said corporation shall be holden on the last Tuesday in September annually; and until the first annual meeting under this act, Charles Dyer, Daniel Jackson, John S. Crary, Frederic A. Norton, Courtland Palmer, Samuel F. Denison, Charles H.

Phelps, Gurdon Trumbull and Robert N. Foster shall be director
of said corporation, with power to fill any vacancy in their num
ber; and to call a meeting of the stockholders if they shal
161 see proper at any time previous to said annual meeting, fo
the purpose of choosing directors as is provided in this act
And the annual meeting shall be held at such place within thi
state, as the directors for the time being shall appoint; at whic
meeting nine directors shall be chosen by ballot; each proprieto
or owner of one share being a member of the corporation; and eac
member being entitled to as many votes as he has shares; provided
that no member shall be entitled to vote upon more than one
fourth part of the whole number, unless as proxy for other mem
bers; and any member absent may have a right to vote by proxy
duly authorized in writing. And a majority of the directors ar
hereby authorized to call the first meeting of said corporation, by
giving notice of the time and place, ten days before the time men
tioned in said notice, by publishing the same in one or more of the
newspapers printed in this state, and in Boston and New York

SEC. 13. And be it further enacted, That if the stock shall no
have been subscribed for, the company organized, and location o
the route filed with the court of common pleas of the county o
counties within which the land proposed to be taken up for the
use of said rail road is situate, previous to the tenth day of April
in the year of our Lord one thousand eight hundred and thirty
five, or if the stock being so subscribed, the company organized, and
location made as aforesaid, the corporation failed to complete the
said rail road before the tenth day of April, in the year of our Lord
one thousand eight hundred and forty, in either of the before
mentioned cases, this act shall be void and of no effect.

SEC. 14. And be it further enacted, That no other rail road than
the one hereby granted (provided the same shall be completed
within the time specified in the thirteenth section of this act)
162 shall, within thirty years from the time the road is opened
for use, be authorized to be made, leading from Providence
to the line of the state of Connecticut, upon any route that shall
carry such road in any part thereof, so near to the rail road hereby
authorized to be made, as that the same shall intersect a straight line
on either side of said rail road, drawn from the point where it com
mences in Providence aforesaid to points ten miles north and ten
miles south of the termination of said rail road, at the line of the
said state of Connecticut; but the state may authorize any com
pany to enter with another railroad, at any point of said railroad
paying for the right to use the same or any part thereof, at such
a rate of toll per mile, for the portion of the road used by such
company so authorized to enter thereon with another railroad, as
said corporation may prescribe for the whole route; and complying
with such rules and regulations as may be established by said cor
poration.

SEC. 15. And be it further enacted, That the state of Rhode
Island shall, if they think proper, have the privilege of subscribing
and owning one thousand shares of the stock of the said rail road

corporation, under the same regulations as other stockholders; and in case the said state should subscribe for the above shares, the general assembly of said state may annually appoint one director to assist to manage the concerns of the said corporation; and if the state do not see fit to subscribe for the said stock as above provided, then the said amount or any part thereof not taken by the state, shall be offered to the citizens of said state for public subscription, according to the provisions of the next succeeding section; and in addition to the shares therein provided to be offered to said citizens.

Sec. 16. And be it further enacted, That the books of the corporation shall be opened at some suitable place within this State,
for three days, to receive the subscriptions of the citizens of
163 this state for the stock for said corporation, to the amount
of two thousand shares, or two hundred thousand dollars;
for which purpose the directors shall give public notice in one or more of the newspapers printed in Providence and Newport, at least three successive weeks of the time and place when and where such books shall be opened. And in case the amount subscribed, shall exceed the number of two thousand shares or two hundred thousand dollars, it shall be apportioned according to the sums respectively subscribed; provided, however, that if the whole amount of the two hundred thousand dollars shall not have been subscribed by the citizens of this state within the time specified, together with such portion of the amount allotted to the state, as they may not think proper to take, then the directors may open the books at some future time, at such place or places as they may think proper; or may distribute the balance of the stock, to any other person or persons who may wish to subscribe for the same.

Sec. 17. And be it further enacted, That at least one of the directors of said corporation being a stockholder, shall be an inhabitant of this state; and such further number at least, as shall be in relative proportion to the stock owned by citizens thereof.

Sec. 18. And be it further enacted, That the property and capital stock of this corporation shall be exempted from every species of taxation, for twelve years from the time said rail road shall be opened for use, unless the neat profits thereof shall sooner amount to six per cent.; and in no case shall a higher rate of duty or tax be levied or imposed upon said corporation, than is or shall be levied or imposed upon bank capital in this state, for the time being.

164 [*Private Laws of Conn., Vol. I. p.* 1019.]

Resolve Incorporating the New York and Stonington Rail Road Company; Passed May, 1832.

Section 1. Resolved by this Assembly, That Charles H. Phelps, Gurdon Trumbull, Peter Crary, William H. Woodbridge, William W. Rodman, George E. Palmer, Charles H. Smith, William C. Denison, Courtlandt Palmer, F. A. Norton, Joseph Goddard, and their associates, successors, and assigns, be, and they are, made a body

politic and corporate, under the name of "The New York and Stonington Rail Road Company," and by that name shall be, and hereby are, made capable in law to sue and be sued to final judgment and execution, plead and be impleaded, defend and be defended in any court of record or in any other place whatsoever; to make, have, and use a common seal, and the same to break, renew or alter at pleasure; and shall be, and hereby are, vested with all the powers, privileges, and immunities which are or may be necessary to carry into effect the purposes and objects of this act, as hereinafter set forth; and the said corporation are hereby authorized and empowered to locate, construct, and finally complete a rail road in Stonington Borough, thence through the town of Stonington to the eastern boundary of this state on Pawcatuck river. And for this purpose the said corporation are authorized to lay out their road not exceeding six rods wide through the whole length, and for the purpose of cutting and embankments and for procuring stone and gravel, may take as much more land as may be necessary for constructing and securing said road.

Provided however, that all damages that may be occasioned to any person or persons by the taking of such land or materials for the purposes aforesaid, shall be paid for by said corporation in the manner hereinafter provided.

SEC. 2. That the capital stock of said corporation shall consist of one thousand shares; and the immediate govern-
165 ment and direction of the affairs of the said corporation shall be vested in a board of not less than five directors, who shall be chosen by the members of the corporation in the manner hereinafter provided; and shall hold their offices until others shall be duly elected and qualified to take their places as directors; and the said directors a majority of whom shall form a quorum for the transaction of business, shall elect one of their own number to be president of the board, who shall also be president of the corporation; and shall have authority to choose a clerk who shall be sworn to the faithful discharge of his duty, and a treasurer who shall give bonds to the corporation with sureties to the satisfaction of the directors in such a sum as the directors may prescribe for the faithful discharge of his trust.

SEC. 3. That the president and directors for the time being are hereby authorized and empowered, by themselves or their agents, to exercise all the powers herein granted to the corporation, for the purpose of locating, constructing, and completing said rail road, and for the transportation of persons, goods, and merchandise, and all such other powers and authorities for the management of the affairs of the corporation not heretofore granted, as may be necessary and proper to carry into effect the objects of this grant; to purchase and hold land, materials, engines, and other necessary things in the name of the corporation for the use of the said road; and for the transportation of persons, goods, and merchandise; and to make such equal assessments from time to time on all the shares in said corporation as they may deem expedient and necessary in the execution and progress of the work, and direct the same to

be paid to the treasurer of the corporation, and the treasurer shall give notice of all such assessments. And in case any subscriber shall neglect to pay his assessment for the space of thirty days
166 after due notice by the treasurer of said corporation, the directors may order the treasurer to sell such share or shares, at public auction, after giving due notice thereof, to the highest bidder, and the same shall be transferred to the purchaser; and such delinquent shall be entitled to the overplus if his shares shall sell for more than the assessment due, with the interest and costs of sale; provided that no assessment shall be laid upon any shares in said corporation of a greater amount in the whole than one hundred dollars on a share.

SEC. 4. That the said corporation shall have power to make, obtain, and establish, all such by-laws, rules, regulations, and ordinances, as they shall deem expedient and necessary to accomplish the designs and purposes, and to carry into effect the provisions of this act, and for the well ordering, regulating, and securing of the interests and affairs of the corporation; provided the same be not repugnant to the constitution or laws of this state or the United States.

SEC. 5. That a toll be, and hereby is, granted and established for the sole benefit of said corporation upon all passengers and property of all descriptions which may be conveyed or transported upon said road, at such rates per mile as may be agreed upon and established from time to time by the directors of said corporation. The transportation of persons and property, the construction of wheels, the form of cars and carriages, the weight of loads, and all other matters and things in relation to the use of said road, shall be in conformity to such rules, regulations, and provisions as the directors shall from time to time prescribe and direct.

SEC. 6. That the directors of said corporation for the time being are hereby authorized to erect toll-houses, establish gates, appoint toll-gatherers, and demand toll upon the road when completed, and upon such parts as may from time to time be completed.

SEC. 7. That there shall be a board of commissioners con-
167 sisting of three persons denominated the commissioners of the New York and Stonington rail road company, who shall be sworn to a faithful discharge of the trust reposed in them by virtue of this act, who shall not be interested in any way whatever in said corporation. And after the route of said railroad shall have been designated and finally located by said company, the said corporation shall be holden to pay all damages that may arise to any person or persons by taking their land for said railroad, when it cannot be obtained by voluntary agreement. And said commissioners shall as soon as convenience will permit, notify, if practicable, the person or persons whose land may have been taken as aforesaid, and who shall not previously thereto have relinquished in writing all claims they may have for damages; on which hearing, and without such hearing when such person or persons shall neglect to appear before them, said commissioners shall make a just and equitable estimate and appraisal of the loss or damage, if any, above the benefit and advantages to the respective owners, or proprietors,

or parties interested in the premises so acquired for the purposes aforesaid, by and in consequence of making and constructing any of the works aforesaid. And the commissioners shall make regular entries of all their determinations and appraisals made under this act in a book to be kept for that purpose, and shall certify and sign their names to the same. And in like manner shall enter their determinations where they shall allow no damages; provided, however, they need make no determination or entry where the proprietor or proprietors gratuitously relinquish their lands to the corporation, or where the corporation and parties in interest shall mutually agree to the price thereof, which damages thus assessed shall be paid by the corporation to the several persons in whose favor such assessment shall have been made within six months after the same shall have been finally established.

Provided also, that an appeal may be taken at any time within sixty days after such decision, as in this act is hereinafter
168 provided.

SEC. 8. Whenever said corporation, or any person interested in any decision made by said commissioners as aforesaid, shall be aggrieved thereby, then and in that case said corporation or individual may, within sixty days after such decision, appeal to the county court in the county of New London, for the appointment of three judicious, disinterested freeholders of said county, to revise the decision of said commissioners; and thereupon said court shall appoint three such persons to review the same, who shall also be sworn to a faithful discharge of their trust; and thereupon the parties in interest being present, or if absent after reasonable notice given, said freeholders shall have all such proof as shall be laid before them, and shall also require of said commissioners the principles on which they made the decision; and thereupon said freeholders shall review the doings of said commissioners, and make up their award in writing thereon, and shall return the same to said court, who shall revise the doings of said commissioners and freeholders, and thereupon, decide the matter in dispute between the parties; which decision shall be conclusive on all parties. And said court may at their discretion tax costs, and issue execution accordingly.

Provided however, in case said freeholders shall neglect or refuse to make their award as aforesaid, within sixty days next after their appointment, the parties appealing as aforesaid shall take nothing by *his* appeal; provided also, that said rail road shall not be opened across the land of any individual until the damages assessed to such individual shall have been paid, or secured to be paid to his satisfaction, and that the said damages shall be so paid within sixty days after the same have been finally determined.

SEC. 9. When the lands or other property or estate of any femme covert, infant, or person non compos mentis, shall be neces-
169 sary for the construction of said railroad, the husband of such femme covert, and the guardian of such infant or person non compos mentis, may release all damages for any lands or

estates taken and appropriated as aforesaid, as they might do if the same were holden in their own right respectively.

SEC. 10. If any person shall wilfully, maliciously, or wantonly, and contrary to law, obstruct the passage of any carriage on said railroad, or in any way spoil, injure, or destroy said railroad, or any part thereof, or any thing belonging thereto, or any material or implements to be employed in the construction, or for the use of the said railroad, he, she, or they, or any person or persons assisting, aiding, or abetting in such trespass, shall forfeit and pay to said corporation for every such offense treble such damages as shall be proved before the justice court, or jury before whom the trial shall be had, to be sued for and recover- before any justice, or any court proper to try the same by the treasurer of the corporation, or other officer whom they may direct, to the use of said corporation; and such offender or offenders shall be liable to prosecution for any offense or offenses contrary to the above provisions; and on conviction thereof before any court competent to try the same shall pay a fine not exceeding one hundred dollars, nor less than thirty dollars, to the use of the state, or may be imprisoned for a term not exceeding one year, at the discretion of the court before whom the conviction may be had.

SEC. 11. That John S. Crary, S. F. Dennison, Charles H. Phelps, Gurdon Trumbull, Courtlandt Palmer, F. A. Norton, and Joseph Goddard, are and shall be the first directors of said company, and they may call a meeting of the stockholders at such time and place as they may think proper for the organization and regulation of said company.

SEC. 12. The annual meeting of the members of said corporation shall be holden on the first Wednesday in July, at such time
170 and place as the directors for the time being shall appoint; at which meeting the directors shall be chosen by ballot, each proprietor being entitled to as many votes as he hold- shares; provided, that no vote shall be given by any proprietor by reason of any share held by him exceeding one tenth part of the whole number of shares; and the directors for the time being, or a majority of them, are hereby authorized to call the first meeting of said corporation by giving notice in one or more newspapers printed in the county of New London, and of the time, place, and purpose of such meeting, at least ten days before the time mentioned in such notice. And the directors are hereby authorized to call special meetings of the stockholders whenever they shall deem it expedient and proper, giving such notice as the corporation by their by-laws shall direct.

SEC. 13. That in all cases where any road or public highway is so located that said railroad cannot be judiciously laid out without interfering therewith, in such case or cases such corporation may by their engineer cause such road or roads to be changed or altered, as that said road may be made on the best site for the purpose. Provided, that when the location of any road is altered, the consent of the commissioners be first had to the said alteration. And provided, that said corporation shall put such road thus altered

in as good repair as the old one was at the time of altering the same.

SEC. 14. That if the said corporation shall not have been organized, and the location of the route filed with the secretary of state previous to the first day of June, in the year of our Lord one thousand eight hundred and thirty-eight, this act shall be null and void.

SEC. 15. That said railroad corporation or company shall constantly maintain in good repair all bridges, with their abutments and embankments, which they may construct for the purpose
171 of conducting their railroad over any river, highway, or private way, or for conducting such highway or private way over said railroad.

SEC. 16. That Henry Kilbourn of Hartford, Isaiah Rogers of Waterford, and Samuel Green of New London be, and they are hereby, appointed commissioners on said railroad, with full power to do and perform all and singular the acts and things required of them under this act, for which services said corporation shall pay them a reasonable compensation, to be adjusted, determined, and allowed by the senate. And whenever said railroad shall be completed, said commissioners shall make out and return to the secretary of this state, the entire expenses of said corporation in the business of making said road. And the senate shall annually thereafter appoint commissioners thereon, and such number as they may deem expedient; and whenever there shall be a vacancy in the board of commissioners, by death or otherwise, such vacancy shall be filled by the governor, or by such other person as shall administer the government of this state, by and with the consent of the senate; and in the recess of the general assembly he may appoint a commissioner or commissioners, until the next meeting of the senate, which commissioners may be removed from office by the senate of this state.

SEC. 17. That the capital stock of said corporation shall be and remain free from taxation, until the tolls collected by said railroad corporation shall be sufficient to afford a dividend of six per cent. per annum on the capital stock.

172 *R. I. Acts and Resolves, June Session*, 1833, *p.* 10.

An Act to United the New York and Stonington Railroad With the New York, Providence and Boston Railroad.

Be it enacted, etc.:

SECTION 1. That from and after the first day of July next, the stockholders in the New York and Stonington railroad company in the State of Connecticut, a corporation created by the legislature of that state, be and they are hereby constituted stockholders in the New York, Providence and Boston railroad company, incorporated in this state, in the year of our Lord one thousand eight hundred and thirty-two, with the same powers, rights and privileges, as if they had originally subscribed an equal amount of stock

in the said Rhode Island corporation; and that all tolls and property, real and personal, and all the powers and interests then owned or afterwards acquired by the said Rhode Island corporation, shall belong to the stockholders for the time being, and the stockholders of the said Connecticut corporation hereby associated with them, in proportion to the number of shares by each of them owned; and that from and after the said first day of July next, neither of the said corporations shall be capable of acquiring or holding separate property of any kind; but that every kind of property, rights and privileges then owned or afterwards acquired, by either of the said companies, shall be deemed and taken to be the joint property of the stockholders for the time being, in the said corporation.

SEC. 2. And be it further enacted, that after the first meeting of the said Rhode Island corporation next after the first day of July next, and at all future meetings, the said Connecticut stockholders shall be entitled to the same notice as the original stockholders; and may be present and act accordingly in as full manner as if
173 they had originally subscribed to the stock of the said railroad company in this state; that all meetings which shall be convened in pursuance of the by-laws which may be established by the original and associated stockholders, shall be legal and valid; and all officers chosen at such meetings shall be officers of this corporation, whether residing in this state or elsewhere; provided there shall always be one or more directors in each state, who is an inhabitant thereof, on whom process against said corporation may be served; that the books and registry of the proceedings of said original and associated stockholders shall be deemed and taken to be the books and proceedings of both corporations.

SEC. 3. And be it further enacted, that the shares of any stockholders in said company, whether made such by the provisions of this act, or otherwise, shall be liable to attachment, and execution within the state where such stockholder shall reside and be inhabiting, at the time such attachment being made; or in case of no attachment being so made, in the state where he shall reside when execution shall be levied therein, as in case of other personal estate; provided that the officer serving or levying any such attachment, execution or other process, whereby to take, hold or create a lien upon the shares of any such stockholder, shall leave with the clerk, or some other officer of the company, or at his last and usual place of abode, an attested copy of the writ of attachment or execution or other process, for taking, holding, or retaining a lien upon such shares; and whenever such shares are sold by virtue of any writ of execution, said officer shall leave with the clerk or some other officer of said company, or at his usual place of abode, a certificate under his hand stating the number of shares by him sold, and to whom sold under such writ of execution; and such purchaser thereof shall thereupon become a stockholder in said company, entitled to
174 all the rights and privileges, and subject to all the duties and liabilities of the debtor or debtors in said writ of execution, in regard to the stock so purchased; and any writ or process against said company shall in like manner be served by the officer leaving

an attested copy thereof with the clerk or some other of said company inhabiting this state, or at his usual place of abode.

SEC. 4. And be it further enacted, that this act shall take effect from and after the first day of July next, provided that thereafter each of the said corporations in the states of Rhode Island and Connecticut shall accept and adopt the provisions of the aforesaid acts.

SEC. 5. And be it further enacted, that whenever the said corporation under the name of the New York, Providence and Boston, and the New York and Stonington Railroad Companies, shall have accepted the provisions of the aforesaid act, and located and established the said railroad at Westerly, between Scolfield's factory and William D. Wells' tan works in the said Westerly, said companies shall thereafter be united and constitute one corporation, under the name of the New York, Providence and Boston Railroad Company; and that a certificate of such acceptance, transmitted to the secretary of this state, shall be sufficient evidence of the same.

175 *(Private Laws of Conn., Vol. IV, p. 975.)*

Incorporating the New London and Stonington Railroad Company. Passed 1852.

Resolved by this Assembly:

SECTION 1. That Charles P. Williams, Thomas Fitch, 2d, Charles Mallory, Asa Fish, Frederick R. Griffin, Henry L. Champlain, Nathan G. Fish, Charles C. Griswold, Belton A. Copp, E. E. Morgan, B. C. Baxter, Henry Hotchkiss, William P. Burrall, N. S. Perkins, Jr., F. W. Lawrence, J. Hammond Trumbull, Benjamin F. Palmer, Isaac Randall, Louis Bristol, Matthew Morgan, John W. Hull, John P. C. Mather and Ralph D. Smith, with such other persons as may associate with them for that purpose, be and they are hereby constituted a body politic and corporate, by the name of the New London and Stonington Railroad Company, and by that name to sue and be sued, plead and be impleaded in any court in this state, to make and have a common seal, and the same to break, alter and renew at pleasure. And said company is hereby authorized and empowered to locate, construct and complete a single, double or treble railroad or way, from some suitable point on the east side of the river Thames, in the town of Groton, opposite or nearly opposite to the city of New London, by the shortest, most feasible and best route, above or below the bridge called Mystic Bridge, by the route called the northern middle route, or by the southern middle route, to be determined by the commissioners of said railroad, to a point in the town of Stonington, at or near the terminus of the New York, Providence and Boston railroad, and to transport, take and carry property and persons upon said railroad or way, by the power and force of steam, of animals, of any mechanical or other power, or of any combination of them, which said company may choose to apply. And said company is hereby vested with
176 all the powers, privileges and immunities conferred and granted by an act of the legislature of this state, passed at

the May session, A. D. 1849, entitled "An act relating to Railroad Companies," and the several acts in addition thereto, and is made subject to all the duties, conditions, restrictions and requirements, imposed by said several acts. And the said company may, at any time before the completion of said road, alter and change any part of the location, or discontinue such part thereof, as in their opinion convenience or necessity may require to be changed or discontinued, subject to the approval of the commissioners on said road, the other requirements of this charter, and the provisions of the act of 1849, relating to railroad companies.

SEC. 2. The capital stock of said company shall be one hundred and fifty thousand dollars, with the privilege of increasing, so as not to exceed six hundred thousand dollars, to be divided into shares of one hundred dollars each.

SEC. 3. That the persons named in the first section hereof, or a majority of them, shall open books to receive subscriptions to the capital stock of said company, at such time and place as they, or a majority of them, may appoint, and shall give such notice of times and places of opening said books, as they may deem reasonable, and shall receive such subscriptions under such regulations as they may adopt for that purpose; and in case the subscriptions shall exceed six thousand shares, the same shall be reduced and apportioned in such manner as may be deemed most beneficial to the corporation.

SEC. 4. That the persons named in the first section hereof, or a majority of them, are hereby authorized, after the books of subscription to the capital stock of said company are closed, to call the first meeting of the stockholders of said company, in such way and at such time and place as they may appoint, for the choice of
177 directors of said company; and in all meetings of the stockholders of said company, each share shall entitle the holder thereof to one vote, which vote may be given by said stockholder in person or by lawful proxy.

SEC. 5. That in case it shall so happen that an election of directors shall not be made on the day appointed by the by-laws of said company, said company shall not for that cause be deemed to be dissolved, but such election may be held on any day which shall be appointed by the directors of said company.

SEC. 6. That when the lands or other property or estate of any femme covert, infant or non compos mentis, shall be necessary for the construction of said railroad, such lands, property or estate may be taken, notice being given to the husband of such femme covert, the guardian of such infant and the conservator of such non compos mentis, and they respectively may release all damage for any land, property or estate taken and appropriated as aforesaid, as they might do if the same were holden in their own right respectively.

SEC. 7. That said railroad company may in the construction of their said road, if necessary, cross, intersect or connect with any other railroad, and may construct their railroad across or upon the same. Provided, however, that in so constructing their said road across or upon any other railroad, or in connecting therewith, they

shall not change or in anywise alter either the grade or the line o
the same; nor in any way enter upon, use or cross such railroad
without first paying such railroad company such portion of the ex
pense of constructing so much of said road as shall be required b
said New London and Stonington Railroad Company, and also such
damage as said railroad may sustain by reason of such construction
or connection as aforesaid; to be ascertained in all respects in the
same manner as is proposed by the tenth section of said act, passed
at the May session, A. D. 1849, entitled "An act relating to Rail
road companies."

178 SEC. 8. That said company be and they are hereby au
thorized and empowered to establish and construct a ferry
from the termination of said railroad on the east side of Thames
river to some convenient point in the city of New London, on the
west side of said river, and for that purpose to acquire and hold all
necessary land and wharfing privileges on either side of said river
and to have, maintain and use proper and convenient boats, pro
pelled by steam or other motive power, for the purpose only of con
veying the passengers and freight of said railroad to and from the
same, and of connecting with any other railroad in said city of New
London.

SEC. 9. Whenever said railroad shall cross the Mystic river, or
any streams, coves or creeks navigated by vessels at or above the
place of such crossing, the said company shall erect draws of such
width or culverts of such height as will suitably and conveniently
accommodate such navigation; the places where such draws or cul
verts shall be erected and the width or height of said culverts
or draws being first determined by the commissioners on said
road, but the draw at the crossing at Mystic river shall not be less
than sixty feet in width; and all vessels shall be permitted at all
times to pass such draws without payment of toll; and suitable per
sons shall be provided by said company to open and shut said draws
on due notice of the approach of said vessels.

SEC. 10. That if said company shall not expend the sum of
seventy-five thousand dollars upon said railroad or way within three
years from the rising of this assembly, or if they shall not con
struct and complete and put in operation a single, double or treble
railroad or way as hereinbefore authorized, within four years after
the passage of this act, then the rights, privileges and powers of said
corporation shall be null and void.

SEC. 11. And for the purpose of crossing said Mystic river with
said railroad, the said company are hereby authorized to
179 make and construct a bridge across said river, at or near the
village of Mystic river, commencing at said bridge on Groton
side, at or near the dwelling house of O. T. Braman, crossing the
Stonington side, between the ship yard of Messrs. Irons and Grin
nell, and Murphy's Point, or across said river above the present toll
bridge, the location of said railroad crossing and bridge to be deter
mined by the commissioners of said New London and Stonington
Railroad, which bridge or crossing shall have at some convenient
place in the channel, (which shall be in the deepest part of the

channel,) a good and convenient draw, to admit free and easy passage of vessels, steamboats, lighters, scows and such other water craft as may have occasion to pass up and down said river; said bridge and draw to be made and completed to the acceptance of the committee hereinafter named, which draw shall not be less than sixty feet in width, on each side of the center of said draw, and there shall be built above and below said draw a good and sufficient pier of stonework or piling of not less than one hundred feet in length and twenty feet in width, with piles driven sufficient to secure any ships or vessels during stormy and unfavorable weather to pass said bridge, and said bridge and draw shall be constructed in such manner, at such place and on such plan as said committee shall direct, which committee shall consist of three disinterested persons, to be approved by the county court for the county of New London. And said committee, before proceeding to the business of their appointment, shall give six weeks' notice thereof, and of the time and place of said meeting, by newspaper publication in the city of New London. And it shall be the duty of said company, provided said bridge shall be located by the crossing first mentioned in this section, to open said draw for the passage, toll free, of all vessels that shall have occasion to pass the same, and said draw shall be kept open, except when the same shall be necessarily closed for the passing of regular trains of cars over and upon said
180 railroad, provided that said draw shall be closed at any time for the passage of extra trains or any reasonable uses of said railroad. And if said draw shall be closed otherwise than as aforesaid, and any vessel shall be thereby hindered or obstructed, said company shall forfeit and pay to the owner or owners of said vessel all damages which said owner or owners may suffer by reason of said detention or obstruction. And no vessel or the owner thereof shall be liable to said company for any injury to said bridge in passing said draw, unless said injury shall be wilfully and wantonly done by the said owner or those having the management thereof. And in case said bridge shall be located by the crossing first mentioned in this section, said company shall cause to be erected a suitable station at each end of said bridge, or near to the same, for the reception of freight and passengers, to the acceptance of the aforesaid committee.

SEC. 12. That this charter may be altered, amended or repealed at the pleasure of the general assembly.

181 *The following is a copy of an agreement between the Hartford and New Haven Railroad Company and the Hartford and Springfield Railroad Corporation, dated the 21st day of September,* 1843, *relating to the construction of the railroad:—*

"Memorandum of an agreement by and between the Hartford and New Haven Rail-road Company, of the first part, the Hartford and Springfield Railroad Corporation, (In Massachusetts) of the second part, and George Bliss, John Howard, Charles Stearns, Theodore Bliss and George Dwight, in behalf of the present stockholders of the latter company, of the third part.

Whereas, the party of the first part are about to extend their Railroad from Hartford to the line of the State of Massachusetts, under their extended charter, and propose to provide funds for, and to construct, also, a continuation of said road from the line of the State to a point in Springfield, or to a junction with the Western Railroad: and whereas it is agreed that said extended road in Massachusetts may be made under the charter of the party of the second part, upon certain conditions hereafter specified: now, therefore, the said several parties hereto, hereby mutually agree as follows, viz:

That the party of the first part, or such persons as they shall designate for the purpose, shall have the use, privilege and control of the charter of the party of the second part, for the purpose of locating, constructing and using said extended rail-road with all the powers and privileges conferred by said charter, and any additions thereto. And for the purpose, the party of the second part agree, that when thereto requested by the party of the first part, they will advertise for and reopen the books of subscription to the stock of said Hartford and Springfield Rail-road corporation, and that, when the subscriptions are made thereto, as hereinafter pro-
182 vided, they will call a legal meeting of stockholders for a reorganization of said company, at which meeting the present directors of said company, or a majority of them, shall resign their offices as such directors; that, thereafter, the party of the second part will pass such legal and proper votes as may be, from time to time, requested by the party of the first part for the location of said road upon such route as the said party of — first part may select therefor, and for the adjustment of the land damages and for the construction of the road thereon, and for the laying and collection of any assessments which they may desire; that they will appoint, for these and all other legal purposes, all such officers as said party of the first part may, in writing, designate, and confer upon them the necessary powers, and will pass all necessary and proper votes for the location and construction of said road, and putting the same under contract, and for the use of same when finished.

And the said party of the first part, in consideration thereof, hereby agree with the said parties of the third part, acting for and in behalf of the present stockholders of said Hartford and Springfield Rail-road Corporation, that when the books for subscription shall be reopened, as before provided, they will procure responsible individuals to make new subscriptions thereto, to increase the capital of said company to the sum of sixty thousand dollars, and to accept the transfer of such stock heretofore subscribed as may be tendered to them by the old stockholders holding the same; that they will pay all such expenses as may have been incurred by individuals in Massachusetts, or by the party of the second part, or assumed by them, for surveys, procuring charter, and for organization; the same not to exceed, in the whole, nine hundred and sixty-eight 35/100 dollars.

And the said party of the first part further agree, that they will, as soon as conveniently may be, construct and open the said rail-road between Hartford and Springfield as follows, viz:

183 1st. That the road shall be located and the grading be put under contract and commenced in one year from Nov. 29, 1842, and the same be completed and opened for use, the parts being connected at the lines of the States, within two years from the same date.

2d. That, at the southern termination, the said road shall be conveniently connected with the tracks and depot of the Hartford, and New Haven Railroad at Hartford, and that the northern part thereof shall be ex'ended to a junction with the Western Railroad, near Connecticut river, or to a point at or near the centre of the village of Springfield.

3d. That said road shall be thoroughly graded, of good width, and with substantial masonry, bridges and depots, and the superstructure throughout the whole distance shall be substantial, and with an iron rail, in weight not less than fifty pounds to the linear yard, and in form similar to that of the Western Railroad, unless otherwise hereafter agreed. In testimony whereof, the said several parties have interchangeably executed this instrument and two others of the same tenor, this twenty-first day of September, A. D. 1843. The said Hartford and New Haven Railroad Company executing the same by their president and secretary annexing the name and seal of the said company, as duly authorized by vote of the same; and the said Hartford and Springfield Rail-road Company, in Massachusetts, executing the same in like manner, and the said third parties under their several hands and seals.

THE HARTFORD AND NEW HAVEN
RAIL-ROAD COMPANY,
By DAVID WATKINSON, *President.*

[Hartford and New Haven Rail-road Company. L. S.]

Attest:

HORATIO FITCH, *Secretary.*
THE HARTFORD AND SPRINGFIELD
RAIL-ROAD CORPORATION,
By GEO. BLISS, *President.*

184 [Hartford and Springfield Railroad Co., in Mass., 1839. L. S.]

Attest:

RICHARD D. MORRIS, *Clerk.*
GEORGE BLISS. [L. S.]
THEODORE BLISS. [L. S.]
GEORGE DWIGHT. [L. S.]
JOHN HOWARD. [L. S.]
CHARLES STEARNS. [L. S.]

185 *Records of the Hartford and New Haven R. R. Co. of Conn., of May* 10, 1847.

In accordance with the provisions of the acts of the legislature of Massachusetts and Connecticut for the union of the Hartford and New Haven Railroad Company with the Hartford and Spring-

field Railroad Corporation, the following votes of the stockholders of both corporations, respectively, and of the united corporations were passed May 10, 1847.

"Whereas the stockholders of the Hartford and New Haven Railroad Company, in Connecticut, at a meeting duly called and warned for the purpose, have made and passed certain votes, of which the following are copies, viz:

At a meeting of the stockholders of the Hartford and New Haven Railroad Company, held at Hartford, in the State of Connecticut, the 10th day of May, 1847, duly called and warned for the purpose of uniting the charters of the Hartford and New Haven Railroad Company, in Connecticut, and the Hartford and Springfield Railroad Corporation in Massachusetts, in conformity to the provisions of said charters, and the amendments thereof: Whereas, by the provisions of the Hartford and New Haven Railroad charter, and the several amendments thereof and additions thereto, it was, and is, among other things, provided, that the persons who should become stockholders in the Hartford and Springfield Railroad Corporation, incorporated by the legislature of the state of Massachusetts, in the year of our Lord 1839, should be stockholders of said Hartford and New Haven Railroad Company, and that, whenever the stockholders should by vote have assented thereto, the said corporations should become united into one corporation, with a capital not exceeding the amount of the joint capital of both corporations: and Whereas prior to such union, it is provided, by said charter and the amendments thereof, and additions thereto, that the several sections and provisions thereof, authorizing said union, should not take effect until the same should have been accepted by the
186 stockholders of each of said corporations, at meetings duly called and warned for the purpose, (nor until said stockholders, of said Hartford and New Haven Railroad Company, also in legal meetings duly warned for that purpose, should have accepted similar provisions contained in said act of the state of Massachusetts, incorporating said Hartford and Springfield Railroad Corporation:) And whereas, the state of Massachusetts, by an act incorporating said Hartford and Springfield Railroad Corporation, and the amendments and additions thereto, have authorized such union, as by said acts, amendments, and additions, aforesaid, may more fully appear: Now, therefore——

Voted, That the stockholders of the said Hartford and New Haven Railroad Company do accept the several sections and provisions of said charter of said Hartford and New Haven Railroad Company, and the several amendments and provisions thereof, and also of the several sections and provisions of the charter incorporating the Hartford and Springfield Railroad Corporations, and the several amendments and additions thereto, in any wise authorizing said union, so far and to such extent as, by the provisions of said acts or either of them, or the amendments or additions to said acts or either of them, the same (are) required to be accepted by the stockholders of the said Hartford and New Haven Railroad Company.

Voted, That the stockholders of this company do assent, that the persons who are now the stockholders of said Hartford and Springfield Railroad Corporation, incorporated as aforesaid, should be stockholders of said Hartford and New Haven Railroad Company, and that said corporations be and become, and they are hereby, by the name of the Hartford and New Haven Railroad Company, united into one corporation, with a capital equal to the amount of joint capital of both of said corporations, pursuant to the provisions of the acts aforesaid, and the several amendments and additions thereto.

Voted, That the directors of said united corporations be, and they are hereby, authorized and directed to issue, in place
187 and lieu of the stock of the said Hartford and Springfield Railroad Corporation, upon a surrender of the same, an equal number of the shares of the stock of said united Hartford and New Haven Railroad Company, under and in pursuance of the aforesaid union. And whereas, also, the stockholders of the Hartford and Springfield Railroad Corporation, in the state of Massachusetts, at a meeting duly called and warned for the purpose, have made and passed certain votes, of which the following are copies, viz:

At a meeting of the stockholders of the Hartford and Springfield Railroad Corporation, incorporated by the legislature of the state of Massachusetts, holden at Hartford in the state of Connecticut, on the 10th day of May, A. D. 1847, duly notified, called, and warned, for the purpose of uniting the charters of the Hartford and New Haven Railroad Company, in Connecticut, and the Hartford and Springfield Railroad Corporation in Massachusetts, in conformity to the provisions of said charter and amendments thereof:

Whereas, by the provisions of the act of the legislature of the state of Massachusetts, incorporating the Hartford and Springfield Railroad Corporation, and the several amendments thereof and additions thereto, it was, and is, among other things, provided, that the persons who were or might be stockholders of the Hartford and New Haven Railroad Company, a corporation established by an act of the legislature of the state of Connecticut, should be stockholders of the Hartford and Springfield Railroad Corporation, together with such persons as were or might become stockholders of said Hartford and Springfield Railroad Corporation, and that, whenever the stockholders should by vote have assented thereto, the said corporations should become united into one corporation, by the name of the Hartford and New Haven Railroad Company, with a capital not exceeding the amount of the joint capital of both corporations: And whereas, before such union could be effected, or
188 certain sections and provisions relative to the same, contained in the said act, amendments thereof and additions thereto, incorporating the said Hartford and Springfield Railroad Corporation, become operative or take affect, it is provided that provisions, similar to those contained in said section, enacted by the legislature of the state of Connecticut, should be accepted by the stockholders of both of said corporations, at meetings duly

called for the purpose, as by said acts, amendments, and additions, aforesaid, more fully appears: Therefore——

Voted, That the stockholders of said Hartford and Springfield Railroad Corporation do accept the several sections and provisions of said act, incorporating the said Hartford and Springfield Corporation, and the several amendments and additions thereto, and also the several sections and provisions of the charter, incorporating the Hartford and New Haven Railroad Company, and the several amendments thereof and additions thereto, in any wise authorizing or pertaining to said union, so far and to such extent as, by the provisions of said acts or any or either of them, or the amendments and additions to said acts or either of them, the same are required to be accepted by the stockholders of this corporation.

Voted, That the stockholders of this corporation to assent, that the persons who are, or may become, stockholders of the Hartford and New Haven Railroad Company, as aforesaid, should be and become stockholders of this corporation, and that said two corporations be and become, and they are hereby united into, one corporation, by the name of the Hartford and New Haven Railroad Company, with a capital equal to the amount of the joint capital of both of said corporations, pursuant to the provisions of the acts aforesaid, and the several amendments thereof and additions thereto.

Voted, That the directors of said united corporations be, and they are hereby, authorized and directed to issue, in place and lieu of the stock now held by the stockholders of this corporation,
189 upon a surrender of the same, an equal number of shares of the stock of the Hartford and New Haven Railroad Company, constituting said united corporation, under and in pursuance of the aforesaid union.

And whereas, said corporations have become united, so far as the separate votes, and actions of said corporations are authorized to unite them: Now, therefore——

Voted, That the stockholders of this, the said united corporation, do accept the several sections and provisions of the acts aforesaid, authorizing said union, and requiring to be by them accepted; and do hereby ratify and confirm all the aforesaid acts and doings of each of said corporations when separately convened as aforesaid, and adopt the same as the acts and doings of said united corporation.

The above is a true copy from the records of the Hartford and New Haven Railroad Company.

Attest:

HORATIO FITCH.
Secretary."

190 *The following is a copy of the agreement executed by the New York and New Haven Railroad Company, by its directors, and by the Hartford and New Haven Railroad Company, by its directors, providing for the union of the two corporations, dated July* 24, 1872:

"Whereas for their Common benefit and interest and for the convenience and benefit of the public the New York and New Haven

Railroad Company and the Hartford and New Haven Rail Road Company did on the third day of August, 1870, enter into certain perpetual covenants and agreements under authority of and in accordance with law which covenants and agreements have merged the entire Railways and properties of said corporations into a joint estate, and have brought the management of both said corporations under a common Board of Managers and have secured perpetually the income of both said roads to be a common fund, for the expenses, liabilities and dividends of both companies; and

Whereas it is provided in said contract, that its purpose is to effect so far as could be then legally done, a complete and perpetual union of rights and interests between the parties thereto, and that to the end that such union may be the better secured and become organic it is therein agreed, that so soon as the same may legally be done, the parties thereto shall be merged and consolidated in a single corporation; and

Whereas, since the execution of said contract of August third, 1870, by the Acts of the Legislatures of the States of Connecticut and Massachusetts, authority has been given to said two companies to unite their corporate rights and estate in one corporation:

Now therefore this agreement between said New York and New Haven Rail Road Company of the one part and said Hartford and New Haven Railroad Company of the other part—Witnesseth:

That the parties hereto in compliance with the stipulation of said contract of August 3rd, 1870, and in accordance with
191 a Statute Law of the State of Connecticut entitled 'An Act in addition to An Act entitled An Act concerning Communities and corporations,' approved July 26, 1871, and a Statute Law of the State of Massachusetts entitled 'An Act concerning the Hartford and New Haven Rail Road Company' approved April 5th, 1872, do hereby covenant and agree with each other in consideration of mutual promises as follows:

1. The Hartford and New Haven Rail Road Company doth hereby sell, transfer, merge and consolidate its corporate rights, powers and estate to, into and with the New York and New Haven Rail Road Company upon the consideration, terms and conditions hereinafter set forth and to which said New York and New Haven Rail Road Company doth hereby assent and agree.

2. The name of the consolidated Company shall be the New York, New Haven and Hartford Railroad Company.

3. The Capital Stock of said New York, New Haven and Hartford Railroad Company shall be Fifteen Million Five Hundred Thousand Dollars, divided into One Hundred and Fifty Five Thousand Shares of the par value of One Hundred Dollars each, which is the amount of the present authorized Capital of the two Companies.

4. Each stockholder in either of the two companies shall receive one share of the Capital Stock of the said consolidated New York, New Haven and Hartford Rail Road Company, for each share of full paid stock held by such stockholder in either the New York and New Haven Rail Road Company, or the Hartford and New

Haven Rail Road Company upon surrender of any outstanding certificates therefor, as the stock shall stand on the books of said companies respectively on the day on which this agreement becomes effective by the approval thereof by the votes of the stockholders of both said companies. Regulations shall be made by the Board of Directors of said New York, New Haven and Hartford Rail
192 Road Company to enable stockholders who may then be in arrears in payment of instalments then due, on stock in either Company, or to make good such deficiency, and by payment of such delayed instalments, on reasonable terms, to become entitled to receive their shares and certificates therefor in said consolidated Company.

5. The Board of Directors of said New York, New Haven and Hartford Rail Road Company shall consist of thirteen stockholders of said Company, a majority of whom shall be a quorum for the transaction of business.

6. The following named persons, to wit: Wm. D. Bishop, Wilson G. Hunt, George B. Carhart, A. R. Van Nest, Horace F. Clark, E. H. Trowbridge, Nathl. Wheeler, Wm. P. Burrall, Chester W. Chapin, Cornelius Vanderbilt, Ezra C. Read, Chas. M. Pond, Henry C. Robinson shall be Directors until the regular election of Directors and shall have and exercise all the powers and duties of a Board of Directors of said consolidated New York, New Haven and Hartford Railroad Company. They shall hold their first meeting for organization and action at the New Haven House in the City of New Haven on the 7th day of August, 1872, at 11 o'clock A. M. and if for any cause said meeting shall fail to be held any two of their number may call a meeting for the purposes aforesaid.

7. Whereas the number of shares of Capital stock of the consolidated company to be received by the stockholders of the Hartford and New Haven Rail Road Company is less than the proportion to which they would be entitled under the agreement of August 1870, and whereas, by the Legislative Acts authorizing this consolidation the capital stock of the Consolidated Company is limited to the aggregate of the present capital stocks of the two corporations, it is hereby agreed by the two Companies parties hereto, that as a compensation for this failure to receive their full share of the capital stock of the consolidated Company, there shall be paid from the funds of the consolidated Company to the stockholders of
193 the Hartford and New Haven Rail Road Company as their stock shall stand on the books of said Company, on the day when this agreement takes effect the sum of ten dollars and thirty three cents on each share of stock held by them respectively, which sum shall be paid by Charles M. Pond now treasurer of said Hartford and New Haven Rail Road Company on and after the 15th day of August 1872.

8. This agreement shall be submitted to the stockholders of the respective Companies, parties hereto, at meetings specially called for that purpose and upon the approval thereof in the manner specified in said Legislative Acts, shall become valid and binding on said corporations respectively, and shall be deemed a transfer of all the

rights, powers, franchises and privileges, and a vesting of all property real and personal, including all rights of way, and rights of action hereinbefore agreed to be vested, transferred, merged and consolidated and the same shall be deemed to be forever vested in the said New York, New Haven and Hartford Rail Road Company in compliance with the terms of said Legislative Acts. In Witness whereof this instrument is executed in the name and under the seals of said New York and New Haven Rail Road Company by their Directors and said Hartford and New Haven Railroad Company by their directors respectively this 24th day of July, 1872.

NEW YORK & NEW HAVEN RAILROAD COMPANY,
By WM. D. BISHOP,
WILSON G. HUNT,
ABM. R. VAN NEST,
E. H. TROWBRIDGE,
N. A. BALDWIN,
JONATHAN GODFREY,
NATHANIEL WHEELER,
HORACE F. CLARK, *Directors.*
194 WM. D. BISHOP, *President.*
EDWARD I. SANFORD, *Secretary.*

[New York & New Haven R. R. Co. Seal.]

THE HARTFORD AND NEW HAVEN RAIL ROAD COMPANY,
By W. P. BURRALL,
ELI BUTLER,
C. W. CHAPIN,
HENRY C. ROBINSON,
EZRA C. REED,
CHAS. M. POND,
JULIUS CATLIN,
C. VANDERBILT, *Directors.*
W. P. BURRALL, *President.*
S. M. MITCHELL, *Sec't'y.*"

[Hartford & New Haven Rail Road Co. Seal.]

This agreement was ratified by the stockholders of the two corporations, and the following is a copy of the votes relating thereto:

"NEW HAVEN, CONN., *August* 1, 1872.

I hereby certify that the foregoing is a true copy of the agreement of merger and consolidation, between the New York and New Haven Railroad Company and the Hartford and New Haven Railroad Company, made and executed by the Directors of said Companies respectively on the 24th day of July 1872, under the provisions of the Statute Laws of the State of Connecticut, and of the State of Massachusetts, relating to the consolidation of the Hartford and New Haven Rail Road Company, with the New York and New Haven Rail Road Company.

And I further certify, that at a meeting of the Stockholders of the New York and New Haven Railroad Company, specially called for that purpose, and held by adjournment, on the 31st day of July 1872, at New Haven, Connecticut said agreement was approved and adopted, by the passage unanimously (by a
195 stock vote, representing 54,077 shares of the stock of said Company), of the following resolution,—namely,

'Resolved. That the contract between this Company and the Hartford and New Haven Rail Road Company for the merger and consolidation of the latter Company, with the New York and New Haven Rail Road Company, which contract was executed by the Board of Directors of both said Companies, on the 24th day of July 1872, be and the same is hereby ratified, confirmed, approved and adopted.'

EDWARD I. SANFORD,
Secretary of the New York & New Haven Railroad Company."

"HARTFORD, CONN., *August* 1, 1872.

I hereby certify that the foregoing is a true copy of the agreement of merger and consolidation, between the New York and New Haven Railroad Company, and the Hartford and New Haven Rail-Road Company, made and executed by the Directors of said Companies respectively on the 24th day of July 1872, under the provisions of the Statute Laws of the State of Connecticut, and of the State of Massachusetts, relating to the consolidation of the Hartford and New Haven Rail Road Company, with the New York and New Haven Railroad Company.

And I further certify, that at a meeting of the stockholders of the Hartford and New Haven Rail Road Company, specially called for that purpose, and held on the 31st day of July 1872, at Hartford, Connecticut, said agreement was approved and adopted, by the passage (by a vote representing 32,946. shares of stock of said Company, viz: 32,897. yeas and 49 noes) of the following preamble and resolution, namely

'An agreement between the New York and New Haven Rail-Road Company, and the Hartford and New Haven Rail Road Company dated July 24, 1872, and executed on behalf of said Companies respectively by their Directors and Officers, and under their respective seals, providing for the completion of the merger
196 and consolidation of the stock, franchises and properties of said companies, in conformity to the Legislative Acts authorizing the same, having been submitted and read

'Resolved, That said Contract be, and the same is hereby approved, ratified and confirmed on the part of this Company.'

STEPHEN M. MITCHELL,
Secretary of the Hartford and New Haven Railroad Company.

Copy. New York and New Haven Railroad Company with Hartford and New Haven Railroad Company. Agreement. Dated: July 24, 1872. Chapt. 171, 1872. Filed Aug. 6, 1872. In Sec. Office.

Commonwealth of Massachusetts,
Office of the Secretary,

BOSTON, *October* 17, 1906.

A true copy:
Witness the Great Seal of the Commonwealth.

WM. M. OLIN,
Secretary."

197 *Plaintiff's Bill of Exceptions.*

(Draft Bill Filed Nov. 1, 1909; Bill of Exceptions Allowed May 6, 1910.)

In the above entitled case the defendant filed a demurrer to the plaintiff's declaration. The plaintiff filed an amendment to her declaration, which was allowed by consent, and a further amendment to her declaration, which was allowed after hearing. The defendant filed an amendment to its demurrer, which was allowed by consent. The case came on to be heard on the defendant's demurrer as amended to the plaintiff's declaration as amended. The demurrer to the first, third, fourth and sixth counts was sustained, and the plaintiff duly excepted.

The plaintiff, being aggrieved by the several rulings aforesaid, prays that the exceptions aforesaid be allowed.

By Her Attorneys, SALTONSTALL, DODGE & CARTER.

May 6, 1910.

Allowed:

FRANCIS C. LOWELL,
Circ. Judge.

198 *Plaintiff's Bill of Exceptions.*

(Draft Bill Filed Jan. 27, 1910; Bill of Exceptions Allowed May 6, 1910.)

In the above entitled cause at the trial before Hale J. and a jury the defendant offered an amended answer as follows:

Now comes the defendant and for further answer says that this action arose out of the injury which occurred in the state of Connecticut upon a line of the railroad operated under the laws of the said state of Connecticut and over which railroad company this Court has no jurisdiction.

Against the objection of the plaintiff the court allowed this amended answer to be filed and saved the plaintiff's exception.

Before the close of the trial the defendant offered another amended answer as follows:

Now comes the defendant and further answering says that the plaintiff's intestate contributed to the injuries which resulted in his death by his own negligence and that the damages should be

diminished by the jury in proportion to the amount of negligence contributed by the plaintiff's intestate.

The plaintiff consented to the filing of this amended answer.

Against the objection of the plaintiff the court allowed
199 this amended answer and the plaintiff's exception thereto was saved.

The plaintiff offered in evidence a notice dated, Boston, June 8, 1909, addressed to the New York, New Haven & Hartford Railroad Company and signed by Mary Agnes Walsh, administratrix, giving to the said New York, New Haven & Hartford Railroad Company notice of the time, place and cause of the injuries and death of her intestate, within four months of the accident; and offered to prove that this notice was served upon the defendant by giving it in hand to T. W. Hoogs, Esq., Secretary to T. E. Byrnes, its Vice President, on June 9, 1909 by Peter P. Fee, Deputy Sheriff of Suffolk County; and that a similar notice was sent to C. S. Mellen, its President, New Haven, Connecticut by registered mail and was receipted for on the 10th day of June, 1909, registry return receipt being signed C. S. Mellen, H. W. Collins. The court excluded this evidence and saved the plaintiff's exceptions.

On motion of the defendant the court directed a verdict for the defendant upon counts 7 and 8 of the plaintiff's declaration and to this ruling and order the plaintiff duly excepted.

The jury, as directed by the court, returned a verdict for the defendant upon counts 7 and 8 of the plaintiff's declaration.

Wherefore, the plaintiff being aggrieved by the rulings of the court files this its bill of exceptions and prays that the exceptions aforesaid may be allowed.

By Her Attorneys, SALTONSTALL, DODGE & CARTER.

May 6, 1910.

Exceptions allowed; judgment ordered.

CLARENCE HALE,
Dist. Judge.

200 On the same day, the following Judgment is entered:

Judgment.

MAY 6, 1910.

It is thereupon, to wit, May 6, 1910, considered by the Court, the Honorable Clarence Hale, District Judge for the District of Maine, duly assigned to hold said Circuit Court sitting, that the said Mary Agnes Walsh, Administratrix, plaintiff, recover of the said New York, New Haven and Hartford Railroad Company, defendant, on the second count of the declaration, the sum of five thousand six hundred forty dollars and twenty five cents ($5640.25) damages, and her costs of suit taxed at .... and that defendant have judgment on the seventh and eighth counts of declaration.

A true record:
Attest:
CHARLES K. DARLING, *Clerk.*

201 *Opinion of the Court.*

October 26, 1909.

LOWELL, *J.:*

The employee's administratrix has filed a declaration in eight counts. The first six are based upon the Federal Act of April 22, 1908, C. 149, 35 Stat. 65. All allege the existence of the employee's widow and children. The first count alleges the employee's suffering caused by the negligence of the defendant and its agents; the second the employee's death from the same cause; the third both suffering and death from the same cause; the fourth the employee's suffering caused by the defendant's defective machinery, etc.; the fifth the employee's death from the same cause; the sixth both suffering and death from the same cause. To summarize, the first three counts charge the defendant's negligence in the language of the statute; the next three counts charge defective machinery, etc.; the first and fourth counts allege conscious suffering only; the second and fifth counts death only; and the third and sixth counts each allege both conscious suffering and death. The seventh and eighth counts were demurred to, but as to them the demurrer has been waived and they need not be considered here.

Section 1 of the Acts reads as follows: "Every common carrier by railroad while engaging in commerce between any of
202 the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of next of kin dependent upon such employee, for such injury of death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The defendant's first ground of demurrer is the alleged unconstitutionality of the statute as a whole. Without reasoning the question thus raised, this court may well leave it for the decision of a higher court, and may formally hold that the first section of the Act is constitutional. With this result agrees the only decided case, Watson v. St. Louis, etc. R. R., 169 Fed. 942.

The defendant has further demurred to Counts one and four, contending that the employee's cause of action to recover for his conscious suffering did not survive to his administratrix, although the existence of some of the statutory relatives was alleged. As the cause of action is given by a Federal Statute, this court cannot have

recourse to a State statute in order to determine whether the
203 cause of action survives or not. Schreiber v. Sharpless, 110 U. S. 76, 80; B. & O. R. R. v. Joy, 173 U. S. 226, 230; U. S. v. De Goer, 38 Fed. 80; U. S. v. Riley, 104 Fed. 275. Rev. Stat. Sect. 955, provides that "When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment." This section does not itself provide what causes of action shall survive, but in the absence of other controlling statute, leaves the matter to the common law. In the case at bar, therefore, the State statutes are inapplicable: there is no general Federal Statute, and the particular statute in question, the Act of 1908, says nothing about survival.

Thus remitted to the common law, at which survival is out of the question, we must here hold that the cause of action did not survive, and so that Counts one and four are demurrable. Fulgham v. Midland Valley Co., 167 Fed. 660. As the statute is in many respects loosely drawn and ambiguous, so that the intent of Congress does not always appear clearly, the court is justified in saying that this result has been reached with reluctance. The maxim "Actio personalis moritur cum persona" has not always commended itself. Pollock on Torts, Webb's Ed. p. 71. The survival of the cause of action in this case is allowed by the statutes of many states. That one who has suffered in body and in purse by the fault of another, and so has a cause of action against the wrong-doer, should, as to his own estate, be deprived of this remedy by the delays of the law or, without such delay, by his death, before or after action brought, whether connected or unconnected with his first injury, seems
204 to me, as to Sir Frederick Pollock, a barbarous rule. The intent or the oversight of the legislature has established the rule in this case.

The defendant has further demurred to Counts three and six, contending that each of these counts has improperly joined liability for conscious suffering to liability for the employee's death. For the reasons above stated, these counts are bad at least in part, and that which is good in them is unobjectionably stated in Counts two and five. As to Counts three and six the defendant's demurrer is therefore sustained.

The demurrer to the first, third and fourth and sixth counts is sustained. The demurrer to the second and fifth counts is overruled. The seventh and eighth counts are not now objected to.

205 *Plaintiff's Petition for Writ of Error.*

(Filed May 7, 1910.)

And now comes the plaintiff in the above entitled action and says that the court in the trial thereof committed certain errors, which will appear in the plaintiff's assignments of error, and the

plaintiff therefore petitions this Honorable Court that a writ of error may issue.

By Her Attorney, E. P. SALTONSTALL.

206 *Plaintiff's Assignment of Errors.*

(Filed May 7, 1910.)

And now comes the plaintiff, Mary Agnes Walsh, administratrix, and assigns as errors on the part of the court in the above entitled action the following to wit:

1. The court erred in sustaining the defendant's demurrer to the first count of the plaintiff's declaration.

2. The court erred in sustaining the defendant's demurrer to the third count of the plaintiff's declaration.

3. The court erred in sustaining the defendant's demurrer to the fourth count of the plaintiff's declaration.

4. The court erred in sustaining the defendant's demurrer to the sixth count of the plaintiff's declaration.

5. The court at the trial erred in allowing the defendant's amended answer as follows: "Now comes the defendant and for further answer says that this action arose out of an injury which occurred in the State of Connecticut upon a line of the road operated under the laws of the said State of Connecticut and over which Railroad Company this court has no jurisdiction."

6. The court erred during the trial in allowing a further amended answer of the defendant as follows: "Now comes the defendant and furthe*ring* answering says that the plaintiff's intestate con-
207 tributed to the injuries which resulted in his death by his own negligence and that the damages should be diminished by the jury in proportion to the amount of negligence contributed by the plaintiff's intestate."

7. The court erred in excluding a notice offered by the plaintiff, dated Boston, June 8, 1909, addressed to the New York, New Haven & Hartford Railroad Company and signed Mary Agnes Walsh, administratrix giving to the said New York, New Haven & Hartford Railroad Company notice of the time, place and cause of the injury and death of her intestate, within four months of the accident, coupled with an offer to prove that this notice was served upon the defendant by giving it in hand to T. W. Hoogs, Esq., secretary to T. E. Byrnes, its Vice President, on June 9, 1909, by Peter P. Fee, Deputy Sheriff of Suffolk County.

8. The court erred in excluding a notice offered by the plaintiff, dated Boston, June 8, 1909, addressed to the New York, New Haven & Hartford Railroad Company, and signed Mary Agnes Walsh, administratrix, giving to the said New York, New Haven & Hartford Railroad Company notice of the time, place and cause of the injury and death of her intestate, within four months of the accident, coupled with an offer to prove that said notice was sent to C. S. Mellen, its President, New Haven, Connecticut, by registered mail

and was receipted for on the 10th day of June, 1909, the registry return receipt being signed C. S. Mellen, H. W. Collins.

9. The court erred in directing a verdict for the defendant upon the seventh count of the plaintiff's declaration.

10. The court erred in directing a verdict for the defendant on the eighth count of the plaintiff's declaration.

By Her Attorney, E. P. SALTONSTALL.

208 *Defendant's Petition for Writ of Error.*

(Filed May 11, 1910.)

And now comes the defendant in the above entitled action and says that the court in the trial thereof committed certain errors which will appear in the defendant's assignment of errors, and the defendant therefore petitions this Honorable Court that a writ of error may issue.

By Its Attorneys, CHOATE, HALL & STEWART.

209 *Defendant's Assignment of Errors.*

(Filed May 11, 1910.)

Now comes the defendant, the New York, New Haven and Hartford Railroad Company, and assigns as errors on the part of the court in the above entitled action, the following, to wit:

1. The court erred in denying the defendant's motion to set aside the order to plead.

2. The court erred in overruling the defendant's demurrer to the second count of the plaintiff's declaration.

3. The court erred in overruling the defendant's demurrer to the fifth count of the plaintiff's declaration.

4. The court erred in allowing the plaintiff to propound the following question to the witness Patrick J. Keating:

"Q. What is your occupation, Mr. Keating?

A. Car inspector at the time.

Q. Car inspector on the New York, New Haven & Hartford Railroad?

A. Yes, sir.

Mr. HALL: Now, I will object to that on the ground I stated to your Honor as to jurisdiction, so that my rights may be preserved."

5. The court erred in allowing the plaintiff to propound the following question to the witness Patrick J. Keating:

"Q. You are car inspector for the New York, New Haven & Hartford Railroad?

Mr. HALL: Subject to my exception.

The COURT: Allowed."

6. The court erred in allowing the plaintiff to propound the following question to the witness Patrick J. Keating:

"Q. What did you do for the railroad, if anything, prior to the time that you were car inspector?

Mr. HALL: I object to this line of inquiry.

The COURT: As being testimony tending to show his do-
210 ing these things in Connecticut?

Mr. HALL: Yes, sir."

7. The court erred in allowing the plaintiff to propound the following question to the witness Patrick J. Keating:

"Q. Now, what were your duties as inspector,—what did you do?

Mr. HALL: I object to this whole line of inquiry.

Q. What did you do as inspector?

A. I inspected the cars as fast as they came in."

8. The court erred in allowing the plaintiff to propound the following question to the witness Patrick J. Keating:

"Q. Now, will you tell us what occurred on the night or early morning that Mr. Walsh was killed, tell the story to the jury?

A. This train pulled in, I forget the number of it, 345 or 346, and it was called the "Boston extra"——

Mr. HALL: I object to this way of putting in facts.

Mr. SALTONSTALL: Supposing an accident happened——

The COURT: He may answer saving Mr. Hall's exception."

9. The court erred in allowing the plaintiff to propound the following question to the witness Patrick J. Keating:

"Q. Mr. Keating, if you are told by anyone that a car contains perishable fruit, what are your duties as to making repairs as to when repairs shall be made?

Mr. HALL: That I object to.

The COURT: He may answer, subject to your exception and objection."

10. The court erred in allowing the plaintiff to propound the following question to the witness Patrick J. Keating:

"Q. Did you have a conversation with Mr. Walsh as to whether it was necessary to repair this car at once—if you can——

A. I did.

Q. As a result of that conversation, whether or not Mr. Walsh and yourself proceeded to make the repairs necessary on this car?

Mr. HALL: I object.

The COURT: He may answer, subject to your objection and exception."

11. The court erred in allowing the following testimony of the witness Albert W. Martin:

"The Boston division of the railroad extended as far as Readville on the Shore Line. From Readville to New London was the Midland division and both divisions were operated by Mr. Byrnes, the Vice-President.

Mr. HALL: I object, if it please the Court, on the ground that I stated to your Honor, and would like my exceptions saved to this line of inquiry."

211 12. The court erred in allowing the plaintiff to propound the following question to the witness Mary Walsh:

"Q. About what was your husband's weight, if you know?

Mr. HALL: I object and ask that my exception be saved.

The COURT: All your rights saved."

13. The court erred in allowing the plaintiff to propound the following question to the witness Mary Agnes Wash:

"Q. During those four years that you knew that he was working for the railroad, how much, if at all, had he been absent, if at all?

Mr. HALL: Subject to my exception."

14. The court erred in allowing the plaintiff to propound the following question to the witness Mary Agnes Walsh:

"Q. Mrs. Walsh, when Dr. Beckwith, who is now dead, was examining your husband for insurance, do you know what insurance was afterwards taken out by your husband in consequence of that examination?

Mr. HALL: That I object to."

15. The court erred in allowing the plaintiff to propound the following question to the witness Mary Agnes Walsh:

"Q. Now, I ask what company it was?

A. Travelers'.

Mr. HALL: Subject to my exception."

16. The court erred in allowing the plaintiff to propound the following question to the witness Mary Agnes Walsh:

"Q. Did you afterwards collect insurance from the Travelers' Insurance Company?

Mr. HALL: That I object to.

The COURT: I admit it, subject to your exception."

17. The court erred in allowing the plaintiff to propound the following question to the witness Walter C. Wright:

"Q. What is the fair value of an annuity on a man's life, the man being thirty-one years of age, and earning $17.70 a week——

Mr. HALL: For seven days?

Q. (continued). —seven days.

Mr. HALL: I object.

The COURT: Note the exception and he may answer."

18. The court erred in allowing the plaintiff to propound the following question to the witness Walter C. Wright:

"Q. If you purchase an annuity from the various companies issuing them, is a difference made in the price of annuity to a man engaged in what is called a hazardous occupation like that of car inspector than to a man engaged in such a business as
212 farming. Is there any difference in the price of an annuity to the two?

Mr. HALL: This is subject to my general exception."

19. The court erred in allowing the plaintiff to propound the following question to the witness Walter C. Wright:

"Q. What is the average life expectancy, according to the annuity tables, of a man at the age of thirty-one years?

Mr. HALL: I object to that for the reasons already stated to the admission of this testimony.

The COURT: Note the exception, and answer."

20. The court erred in allowing the plaintiff to propound the following question to the witness Watler C. Wright:

"Q. And without bothering to give all five, will you state the

maximum and minimum of the five tables which you have worked out?

Mr. HALL: Subject to my exception.

The COURT: Note the exception, and answer."

21. The court erred in allowing the plaintiff to propound the following question to the witness Walter C. Wright:

"Q. As long as the maximum is "Healthy District," it might be well, subject to the exception of Mr. Hall, to give us all five. Will you give five to one, stating the name of the company and the amount of it"?

Mr. HALL: Subject to my exception.

The COURT: Note the exception, and answer."

22. The court erred in allowing the plaintiff to propound the following question to the witness Walter C. Wright:

"Q. What would be the average expectancy of life under those five tables, if you know?

Mr. HALL: I object for the various reasons I have stated in my previous objections to this line of inquiry.

The COURT: Note the exception, and answer."

23. The court erred in allowing the plaintiff to propound the following question to the witness Walter C. Wright:

"Q. As the rate of interest decreases, does the price of an annuity increase or decrease?

Mr. HALL: Subject to my exception.

The COURT: Note the exception, and answer."

24. The court erred in allowing the plaintiff to propound the following question to the witness Michael J. Walsh:

"Q. Was your brother a man who used liquor to excess?

Mr. HALL: That I object to, on the ground already stated, as being immaterial for the question of damages.

The COURT: Note the exception, and answer."

25. The court erred in allowing the plaintiff to propound
213 the following question to the witness Michael J. Walsh:

"Q. Was your brother immoral in his habits?

Mr. HALL: And to this line of inquiry.

The COURT: Note the exception."

26. The court erred in allowing the plaintiff to propound the following question to the witness Michael J. Walsh:

"Q. On what railroad?

A. New York, New Haven & Hartford Railroad.

Mr. HALL: Wait a second, I object to this.

The COURT: On what ground?

Mr. HALL: It is not important for him to show on what railroad they were working. I think to maintain my position on the question of jurisdiction——

The COURT: I admit it and save your exception."

27. The court erred in allowing the plaintiff to propound the following question to the witness Michael J. Walsh:

"Q. Will you state what your brother's health was, what was the condition of his health at the time he died, if you know?

Mr. HALL: Subject to my exception."

28. The court erred in allowing the plaintiff to propound the following question to the witness Michaled J. Walsh:

"Q. Did he ever have a bad illness?

Mr. HALL: Subject to my exception."

29. The court erred in allowing the plaintiff to propound the following question to the witness Lucien M. Sheffield:

"Q. You have frequently known such a lantern as that, Mr. Sheffield, to fall from a car without breaking the glass, have you not?

Mr. HALL: That I object to."

30. The court erred in allowing the plaintiff to propound the following question to the witness James J. Hoban:

"Q. Where did it come from and where did it go to?

Mr. HALL: That I object to.

The COURT: Note the exception, and answer."

31. The court erred in refusing to give the defendant's request for ruling No. 1:

"Upon all the evidence the plaintiff cannot recover."

32. The court erred in refusing to give the defendant's request for ruling No. 2:

"That the court dismiss the cause for want of jurisdiction."

214 33. The court erred in refusing to give the defendant's request for ruling No. 3:

"That this action arose out of an injury which occurred in the State of Connecticut upon the line of a railroad company operated under the laws of the State of Connecticut."

34. The court erred in refusing to give the defendant's request for ruling No. 4:

"That the action arose out of an injury which occurred in the State of Connecticut upon the line of a railroad company operated under the laws of said State of Connecticut and over which railroad company this court has no jurisdiction."

35. The court erred in refusing to give the defendant's request for ruling No. 5:

"That the court dismiss this cause for the reason that the plaintiff has no right to maintain its action in this court."

36. The court erred in refusing to give the defendant's request for ruling No. 6:

"That the court dismiss this action for the reason that there is no evidence that would warrant the jury in finding that the cause of action arose upon a line of railway belonging to the defendant."

37. The court erred in refusing to give the defendant's request for ruling No. 7:

"That the court dismiss this action for want of jurisdiction for the reason that if any cause of action exists in favor of the plaintiff, it exists against a corporation existing and operating under the laws of the State of Connecticut and separate and distinct from the defendant railroad company."

38. The court erred in refusing to give the defendant's request for ruling No. 8:

"That the court dismiss this cause for the reason that if it shall be found that any cause of action arose on the line of this de-

fendant, it was upon the line of this defendant while a citizen of the State of Connecticut."

39. The court erred in refusing to give the defendant's request for ruling No. 9:

"That the court direct a verdict for the defendant because the Act of Congress upon the provisions of which this alleged cause of action is based is unconstitutional because:

215 (*a*) Congress has no power under Article I, Section 8 of the United States Constitution to pass this Act;

(*b*) The Act assumes to govern the relations of master and servant as between an interstate carrier and an interstate employee;

(*c*) The Act is not in any sense a regulation of commerce among the several states;

(*d*) The Act provides a remedy only to an injured employee and therefore is in no sense an act to regulate commerce;

(*e*) By the provisions of the Act the defendant would be made liable by reason of the negligence of an intrastate employee;

(*f*) Congress is prohibited by the terms of the Fifth Amendment to the United States Constitution from depriving any person of life, liberty or property without due process of law;

(*g*) The Act violates the true intent of the Fifth Amendment to the United States Constitution;

(*h*) The Act violates the true intent of the Fourteenth Amendment to the United States Constitution;

(*i*) The Act is partial in its operation and not founded on reasonable or just classification;

(*j*) The Act is not limited in its operation to such claims of employees as might rightfully be embraced within its terms;

(*k*) Congress has no power to provide a remedy to an injured employee of an interstate carrier as provided in Section 3 of the Act;

(*l*) It violates the Constitution of the State of Connecticut;

(*m*) That the provisions of the Act violate the provisions of the statutes of the State of Connecticut;

(*n*) That the Act has been held unconstitutional in the State of Connecticut.

40. The court erred in refusing to give the defendant's request for ruling No. 10:

"The plaintiff cannot recover because there is no sufficient provision whereby the damages may be assessed by the jury."

41. The court erred in refusing to give the defendant's request for ruling No. 11:

"The plaintiff cannot recover in this action because Congress cannot create such a right of action in favor of personal representatives of an inhabitant of a state."

42. The court erred in refusing to give the defendant's
216 request for ruling No. 12:

"The plaintiff cannot recover because the provisions of the Act are contrary to the law of the State of Connecticut."

43. The court erred in refusing to give the defendant's request for ruling No. 13:

"There is no evidence that would warrant the jury in finding that

the defendant was engaged in interstate commerce at the time the plaintiff's intestate was injured."

44. The court erred in refusing to give the defendant's request for ruling No. 14:

"There is no evidence that would warrant the jury in finding that the plaintiff's intestate was employed by the defendant in interstate commerce at the time of his death."

45. The court erred in refusing to give the defendant's request for ruling No. 17:

"There is no sufficient evidence that would warrant the jury in finding that the plaintiff's intestate was injured by reason of any negligence of any employee of the defendant."

46. The court erred in refusing to give the defendant's request for ruling No. 19:

"In order to recover for the negligence of the switchman Williams, the plaintiff must show affirmatively by a fair preponderance of the evidence that at the time that Williams opened the switch to permit the cars to go on to 21 the blue light was upon the car and burning so as to apprise Williams of the existence of men beneath the car, or the plaintiff must show why by a fair preponderance of the evidence that Williams had some other reason to know that the men were beneath the car."

47. The court erred in refusing to give the defendant's request for ruling No. 22:

"There is no evidence that would warrant the jury in finding that the conductor Hoban knew or had reason to know in the exercise of reasonable care that there were men beneath car #85070 at work."

48. The court erred in refusing to give defendant's request for ruling No. 23:

"If it shall appear that the plaintiff's intestate had an opportunity to warn the men of the switching crew that he was intending to work beneath the car under which he was injured and that it was the practice on the part of inspectors to inform the switching crew that they proposed to work beneath the car and that it
217 would have been the exercise of due care on his part to have warned the switching crew if he had an opportunity so to do, then the jury may find that Walsh contributed to the injury and to the extent he contributed they may mitigate the damages, assuming that they find some officer, agent or employee of the defendant negligent."

49. The court erred in refusing to give the defendant's request for ruling No. 24:

"The circumstances and exigencies of working at night in a freight yard where there are many tracks and a constant moving of cars and engines at varying rates of speed require from the men so employed the utmost vigilance to protect themselves from injury."

50. The court erred in refusing to give the defendant's request for ruling No. 26:

"The sum of $900 per year does not fairly represent the yearly

value of the plaintiff's intestate's life to the plaintiff measured in dollars and cents."

51. The court erred in refusing to give the defendant's request for ruling No. 23 in terms and in giving it as modified.

52. The court erred in refusing to give the defendant's request for ruling No. 24 in terms and in giving it as modified.

53. The court erred in refusing to give the defendant's request for ruling No. 26 in terms and in giving it as modified.

54. The court erred in refusing to give the defendant's request for ruling No. 25:

"The jury have no right to consider either the value or the price of an annuity which would yield $900 per year in determining the amount of damages to be assessed in this action."

55. The court erred in refusing to give the defendant's request for ruling No. 28:

"That the court dismiss this action because the defendant is not a citizen of Massachusetts, but is a citizen of Connecticut."

56. The court erred in refusing to give the defendant's request for ruling No. 29:

"That the court dismiss this action because if the defendant is a citizen of Massachusetts, the court must also recognize it as a citizen of Connecticut."

218 57. The court erred in refusing to give the defendant's request for ruling No. 30:

"That the court dismiss this action because if it should be held for the purposes of jurisdiction in this case that the defendant is a citizen of Massachusetts only, yet that the Massachusetts corporation which is made the defendant in this case is not liable to this plaintiff because it could not and did not commit through its agents, servants or employees the act of negligence upon which the plaintiff relies to recover."

58. The court erred in his instructions to the jury in that part of the charge relating to Williams opening the switch and the circumstances tending to place the lantern there.

59. The court erred in his instructions to the jury upon the question of damages because the instructions were inconsistent with the defendant's requests.

60. The court erred in his charge to the jury in stating that there was compensation and damages.

61. The court erred in his charge to the jury in pointing out to the jury that the measure of damages to the intestate's widow and children depended upon his solicitude and care as a father and in his specific instructions as to what that life was worth to the widow and children.

62. The court erred in his instructions to the jury that the jury might consider the reasonable expectation as to what he would receive as life advanced and what he would be able to earn.

63. The court erred in giving the plaintiff's 5th request to the jury:

"If the jury find that the only rule prescribed by the Railroad Company to be observed by men working about or under cars at

night was that they should display a blue light, and that such protection was adequate in a yard such as the plaintiff's intestate was working in, and under the conditions under which he was working, then they are warranted in finding negligence of the defendant or of its officers in setting the plaintiff's intestate to work or allowing him to go to work in the place in which he did, under those conditions."

219 64. The court erred in giving the plaintiff's 7th request to the jury:

"Railroad corporations created by concurrent legislation of two or more states, having a joint interest in the operation of the entire line of road extending through or into such several states, are jointly liable for a tort committed in its operation in either state.

Smith v. N. Y., N. H. & H. R. R. Co., 96 Fed. 504.

Boston & Maine R. R. Co. v. Hurd, 108 Fed. 116."

65. The court erred in giving the plaintiff's 9th request to the jury:

"The measure of damages is compensation for the pecuniary loss sustained by the widow and children of the plaintiff's intestate."

66. The court erred in giving the plaintiff's 10th request to the jury:

"In determining the pecuniary loss to the children of the intestate the jury are entitled to consider their loss of care, attention, instruction and training from their father's death."

67. The court erred in giving the plaintiff's 11th request to the jury:

"Life or mortuary tables may be used as an aid in determining the probable duration of human life. They do not furnish an absolute rule of computation. Each case must stand on its own conditions. The jury are to determine whether or not the deceased would live out the term of his life expectancy, and in determining this they are to consider his character, habits and morals, his state of health, his care of himself and the occupation in which he was engaged."

68. The court erred in giving the plaintiff's 12th request to the jury:

"Annuity tables may be considered by the jury in ascertaining the compensation the plaintiff is entitled to receive for the pecuniary injury done to the widow and children by the death of the intestate; but the jury are also to consider the state of health of the intestate, his age, habits, occupation and the likelihood of his being able to continue to work during the period of the expectancy of life."

By its Attorneys:

By Its Attorneys, CHOATE, HALL & STEWART.

220 *Stipulation Waiving the Filing of Bonds on Writs of Error.*

(Filed May 11, 1910.)

The requirement of the filing of a bond by either party in the above entitled case to perfect the proceedings by exceptions and writ of error is hereby waived.

E. P. SALTONSTALL,
Attorney for Plaintiff.
CHOATE, HALL & STEWART,
Attorneys for Defendant.

221 *Defendant's Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to Mary Agnes Walsh, a resident of New London, in the State of Connecticut, an alien, subject of Edward the Seventh, King of the United Kingdom of Great Britain and Ireland, administratrix of the estate of Daniel Joseph Walsh, late of said New London, duly appointed by the Probate Court for the District of New London in said Connecticut, and the Probate Court for the County of Suffolk, in Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the* sixteenth day of May current, pursuant to a Writ of Error filed in the Clerk's Office of the† Circuit Court of the United States for the District of Massachusetts wherein the New York, New Haven and Hartford Railroad Company, a corporation organized under the laws of the Commonwealth of Massachusetts, and a citizen thereof, having an usual place of business at Boston, in the District of Massachusetts, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Clarence Hale, Judge of the District Court of the United States for the District of Maine, duly assigned to hold said Circuit Court, this eleventh day of May, in the year of our Lord one thousand nine hundred and ten.

CLARENCE HALE,
U. S. District Judge.

*Not exceeding 30 days from the day of signing.
†Name of Court to which Writ of Error is directed.

222 *Plaintiff's Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the New York, New Haven and Hartford Railroad Company, a corporation organized under the laws of the Commonwealth of Massachusetts, and a citizen thereof, having an usual place of business at Boston, in the District of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the* sixteenth day of May next, pursuant to a Writ of Error filed in the Clerk's Office of the† Circuit Court of the United States for the District of Massachusetts wherein Mary Agnes Walsh, a resident of New London, in the State of Connecticut, an alien, subject of Edward the Seventh, King of the United Kingdom of Great Britain and Ireland, administratrix of the estate of Daniel Joseph Walsh, late of said New London, duly appointed by the Probate Court for the District of New London in said Connecticut, and the Probate Court for the County of Suffolk, in Massachusetts, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Clarence Hale, Judge of the District Court of the United States for the District of Maine, duly assigned to hold said Circuit Court, this eleventh day of May, in the year of our Lord one thousand nine hundred and ten.

CLARENCE HALE,
U. S. District Judge.

*Not exceeding 30 days from the day of signing.
†Name of Court to which Writ of Error is directed.

223 *Stipulation Waiving the Service of Citation on Writs of Error.*

(Filed May 11, 1910.)

It is hereby agreed that service of the citations on the writs of error is hereby waived.

E. P. SALTONSTALL,
Attorney for Plaintiff.
CHOATE, HALL & STEWART,
Attorneys for Defendant.

224 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record in the cause entitled, No. 605, Law Docket, Mary Agnes Walsh, Administratrix, Plaintiff, v. New York, New Haven and Hartford Railroad Company, Defendant, in said Circuit Court determined, the Opinion of the Court of October 26, 1909, the Petitions for Writs of Error, the Assignments of Errors, the Stipulation Waiving the Filing of Bonds on Writs of Error, and also the original Citations upon the Writs of Error issued in said cause, and the Stipulation Waiving the Service of said Citations on Writs of Error.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this thirteenth day of May, A. D. 1910.

[Seal of the Circuit Court, Massachusetts.]

CHARLES K. DARLING, *Clerk.*

Endorsed on cover: File No. 22,179. Massachusetts, C. C. U. S. Term No. 558. New York, New Haven & Hartford Railroad Company, plaintiff in error, vs. Mary Agnes Walsh, Administratrix of the estate of Daniel Joseph Walsh, deceased. File No. 22,180. Term No. 559. Mary Agnes Walsh, Administratrix of the estate of Daniel Joseph Walsh, deceased, plaintiff in error, vs. New York, New Haven & Hartford Railroad Company. Filed May 16th, 1910. File Nos. 22,179 and 22,180.

FILED
MAY 16 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM 1909

No. [redacted] 289

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY
PLAINTIFF IN ERROR

v.

MARY AGNES WALSH, ADMX.
DEFENDANT IN ERROR

No. [redacted] 390

MARY AGNES WALSH, ADMX.
PLAINTIFF IN ERROR

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY
DEFENDANT IN ERROR

MOTION TO ADVANCE CASES FOR ORAL ARGUMENT

JOHN L. HALL,
Attorney for New York, New Haven and Hartford Railroad Company.

Supreme Court of the United States

OCTOBER TERM, 1909.

No.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,

PLAINTIFF IN ERROR

v.

MARY AGNES WALSH, ADMX.,

DEFENDANT IN ERROR.

No.

MARY AGNES WALSH, ADMX.,

PLAINTIFF IN ERROR

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,

DEFENDANT IN ERROR.

MOTION TO ADVANCE CASES FOR ORAL ARGUMENT.

Comes now the New York, New Haven & Hartford Railroad Company and moves that this Honorable Court may advance the above entitled cases for hearing on October 11, 1910, for the following reasons:—

1. That the matters involved in said cases concern the constitutionality of the Act of Congress approved April 22, 1908, entitled "An Act relating to the Liability of

Common Carriers by Railroad to their Employees in Certain Cases."

2. That this Honorable Court has advanced for oral argument on October 11, 1910, certain other cases involving the constitutionality of the said Act of Congress, one of which cases is entitled "*Northern Pacific Railroad Company* v. *Bessie Babcock.*"

3. That it believes that the said cases entitled *New York, New Haven & Hartford Railroad Company* v. *Mary Agnes Walsh, Admx.*, and *Mary Agnes Walsh, Admx.*, v. *New York, New Haven & Hartford Railroad Company*, involve the consideration of questions of law which arise in the said cases already advanced for oral argument, and furthermore involve additional questions of law arising under said Act of Congress above referred to.

JOHN L. HALL,

Attorney for New York, New Haven and Hartford Railroad Company.

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In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1910.

No. 558.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, *Plaintiff in Error*

v.

MARY AGNES WALSH, ADMINISTRATRIX OF THE ESTATE OF DANIEL JOSEPH WALSH, DECEASED.

No. 559.

MARY AGNES WALSH, ADMINISTRATRIX OF THE ESTATE OF DANIEL JOSEPH WALSH, DECEASED, *Plaintiff in Error*

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

BRIEF FOR THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

STATEMENT.

This is an action to recover damages which arises out of the death of the plaintiff's intestate. It was instituted in the Circuit Court of the United States for the District of Massachusetts. The plaintiff's declaration consisted of eight counts, the second of which was alone submitted to the jury, and the only one that is material for the consideration of this court.

The second count, as finally amended, is as follows:—

Count 2.

"Now comes the plaintiff, Mary Agnes Walsh, residing in New London in the State of Connecticut, who is an alien, a subject of Edward VII., King of the United Kingdom of Great Britain and Ireland, and av[illegible] that she is the duly appointed, qualified and acting administratrix of the estate of Daniel Joseph Walsh, deceased, who last dwelt in said New London; and was so duly appointed by the Probate Court of the County of New London in the State of Connecticut by letters of administration on said estate duly issued to her thereby; and was duly appointed by the Probate Court for the County of Suffolk and the Commonwealth of Massachusetts by letters of administration on said estate duly issued to her thereby, and she was appointed an agent in said Commonwealth in accordance with the provisions of Revised Laws, Chap. 139, § 8; and that the defendant, the New York, New Haven & Hartford Railroad Company, is a corporation duly organized under the laws of said Commonwealth of Massachusetts, and a citizen thereof, and is engaged in commerce between the several states and has a usual place of business in Boston in said district; and that the defendant was a corporation and was so engaged in such commerce on the eleventh day of February, 1909; that for the purpose of such commerce between the several states the defendant maintained a yard in the County of New London and State of Connecticut and there employed the plaintiff's intestate in such commerce; and while the plaintiff's intestate was engaged in replacing a draw bar on one of the defendant's cars then in use in such commerce, or in other similar or kindred work on such car, he was so injured by reason of the negligence of the officers, agents or employees of said carrier in pushing another car or cars against the car or cars on which the plaintiff's intestate was working, that he died of the injuries so received; that said Daniel Joseph Walsh left surviving him Mary Agnes, his widow, the plaintiff herein, and also James Edward, aged four years, Daniel Joseph,

aged two years, and William Patrick, aged four months, his only heirs and next of kin, which widow and children were dependent on him for support, and that said action is brought by the plaintiff for the benefit of the surviving widow and children.

Wherefore the plaintiff as such administratrix prays judgment against the defendant for the sum of twenty-five thousand dollars ($25,000) and costs."

The plaintiff, having filed the pleadings on her behalf pursuant to Rule 12, the defendant under the provisions of said Rule is ordered to plead thereto within one calendar month thereafter, subject to the penalty of default. On the 21st day of July, 1909, an affidavit of service of order to plead was filed; on the 15th day of August, 1909, the following motion to set aside the order to plead was filed:—

"Now comes the defendant in the above entitled action and respectfully represents that the writ in the above entitled action is returnable on the 19th day of October, 1909, and that in accordance with the practice of this court, the defendant should be allowed thirty days thereafter within which to answer, or to demur, but the plaintiff having on the 19th day of July, 1909, filed his writ and declaration in accordance with Rule 12 of this court, an order of this court then issued ordering the defendant to plead within one calendar month from the said 19th day of July, 1909. Your defendant further represents that it is not within the power of this Honorable Court to command the defendant to so plead before the return day of the writ.

WHEREFORE your defendant moves that the above order of this Honorable Court be set aside, and your defendant be allowed the customary thirty days from the return day of the writ within which to answer."

On the same day it was ordered by the court that the motion to set aside the order to plead be denied. Exceptions were filed to this upon the 7th day of August,

1909, and upon the 17th day of August, 1909, the defendant filed its demurrer.

That portion of the demurrer which concerns the attention of this court is as follows:—

> "Now comes the defendant in the above entitled action and demurs to the plaintiff's declaration and the several counts thereof, and for causes of demurrer says:
>
> 1. . . . .
> 2. . . . .
> 3. That Count 2 does not state a legal cause of action against this defendant because the Act of Congress, upon the provisions of which this alleged cause of action is based, is not constitutional:
>
> (*a*) Because Congress has no power, under Article 1, Sec. 8, of the U. S. Constitution, to pass this Act.
>
> (*b*) Because the Act assumes to govern the relations of master and servant as between an interstate carrier and an interstate employee.
>
> (*c*) Because the Act is not in any sense a regulation of commerce among the several States.
>
> (*d*) Because the Act provides a remedy only to an injured employee and is therefore in no sense an Act to regulate commerce.
>
> (*e*) Because by the provisions of the Act the defendant would be made liable by reason of the negligence of the intrastate employee.
>
> (*f*) Because Congress is prohibited, by the terms of the Fifth Amendment to the United States Constitution, to deprive any person of life, liberty or property without due process of law.
>
> (*g*) Because the Act violates the true intent of the Fifth Amendment to the United States Constitution.
>
> (*h*) Because the Act is partial in its operation and not founded on reasonable or just classification.

(*i*) Because the Act is not limited in its operation to such classes of employees as might rightfully be embraced within its terms.

(*j*) Because Congress has no power to provide a remedy to an injured employee of an interstate carrier as provided in Sec. 3 of the Act."

The court overruled the defendant's demurrer to the 2d count.

The defendant's final answer was as follows:—

"And now comes the defendant, not admitting but denying the jurisdiction of the court over it in this action, and not waiving but relying upon its demurrer heretofore filed in said cause, and denies each and every allegation in the plaintiff's writ and declaration contained.

And for further answer the defendant says that this action arose out of an injury which occurred in the State of Connecticut upon a line of the railroad operated under the laws of the said State of Connecticut, and over which railroad company this court has no jurisdiction.

And further answering, the defendant says that the plaintiff's intestate contributed to the injuries which resulted in his death by his own negligence, and that the damages should be diminished by the jury in proportion to the amount of negligence attributable to the plaintiff's intestate."

FACTS.

Upon February 11, 1909, Daniel Joseph Walsh, the plaintiff's intestate, received injuries resulting in his death, while employed by the defendant as a car inspector in its Midway yard at New London, Connecticut. At that point upon the defendant's lines known as Midway, the main tracks of the defendant run in an easterly and westerly direction through Midway yard, which is located about three miles east of the city of New London. South of the main line there are thirteen tracks in the yard, numbered from one to twenty-five in odd numbers. Tracks 21, 23, and 25 are known as "repair tracks," although cars which do not need repairs are placed on these tracks.

It was part of Walsh's work to inspect and repair cars that came into the Midway yard.

At about three o'clock in the morning of February 11, 1909, a train designated as the "Boston Extra" pulled into the Midway yard. It came from the east and from some point outside of the State of Connecticut.

Upon inspection of the train by Walsh and one Keating, also a car inspector, car No. 85075 was found defective, and was ordered by them on to track 21. The draft spring of the car was out of order, and in making the repairs the men found it necessary to go underneath the car.

A rule of the company for the protection of the men was as follows:—

> "A blue flag by day and a blue light by night displayed at one or both ends of an engine, car or train, indicates that workmen are under or about it. When thus protected, it must not be coupled to or moved. Workmen will display the blue signals and the same workmen are alone authorized to remove them. Other cars must not be placed

on the same track so as to obstruct the view of the blue signals without first notifying the workmen."

It was unusual to repair cars at night (Record, p. 43), and, when car inspectors went beneath the cars for purposes of repair, it was the custom in that yard for the inspectors to notify the yard crew of their intention (Record, p. 40).

After car No. 85075 had been placed upon track 21, Keating testified that he placed a blue light upon the east end of the car: whereupon he and Walsh went beneath the west end of the car and proceeded to work upon the broken spring. They had not completed their work when another train pulled in. They then left the car upon which they were working and inspected the other train. Then they rode back to a crossing shanty, where they entered and warmed their hands.

In that part of the yard where car No. 85075 had been placed, there was working a switching crew under the charge of Hoban, the conductor, and among the crew were Lidbury and Williams, brakemen.

Both Keating and Walsh saw Hoban, the conductor, while working on the second train, and spoke to him. They saw Williams and Lidbury and other members of the switching crew, but they told neither Hoban nor any member of his crew that they were going to work on a car upon track 21.

Having been in the shanty a short time, they walked about ten car-lengths to car No. 85075, and Keating testified that he saw the blue light upon it when he again went beneath the car.

Williams, the brakeman, did the switching in the yard near track 21. He received orders from his conductor to shift cars on to tracks 17 and 21. By throwing the switch known as No. 19, which was located about 80 feet from track 21, cars could be let in upon track 21. Car No. 85075 was about 120 feet west of the junction of tracks 21 and 19.

When Williams threw switch No. 19, there was nothing to obstruct his view of car 85075, and he saw the car on track 21. It was about six car lengths away, and he could see the east end of the car. There was no blue light on the car. If there had been such a light, it was his duty not to let a car on to that track (Record, p. 44). He did not know that any men were repairing underneath the car. It was an unusual thing to repair upon track 21 at night.

After the switch was thrown, New Haven car No. 74301 struck car 85075, and Williams was told a short time afterwards that Walsh had been hurt.

After the collision Hoban, the conductor, found a lantern on the ground. It was not lighted or bent, and even the globe was not broken.

It appeared that the sill upon the east end of car 85075 was a small iron projecting out about two or three inches (Record, p. 41), or "the sill was nothing more than a projection of the steel frame that came out three or four inches" (Record, p. 43). The lantern which was offered in evidence could not have rested upon any such foundation without falling to the ground.

One Kilpatrick, a yard clerk, was at the west end of the car under which the men were at work, and spoke to them. He saw no blue light, although he did not go by the east end of the car. Lidbury, another member of the switching crew, went to the place of the accident, but did not see the blue light. He saw a lantern afterwards, and found no portion of it broken or bent, nor was the globe broken. He had known of lanterns going out, that is, the lantern might go out if the wick was crusted over.

Testimony was offered by the plaintiff as to the physical condition of Walsh, his habits and manner of living. Testimony was also offered as to the fair value of an annuity, which was a matter of exception, and will be considered later in the brief.

ARGUMENT.

The Constitutionality of the Federal Employers' Liability Act.

The contention of the plaintiff in error is that the enactment by Congress of what is described as the Employers' Liability Act is unconstitutional, and the discussion involves the questions that were raised by the plaintiff's assignments of error numbered 2 and 39.

The 2d assignment of error is as follows:—

> "The court erred in overruling the defendant's demurrer to the second count of the plaintiff's declaration."

The 39th assignment is as follows:—

> "The court erred in refusing to give the defendant's request for ruling No. 9,—'That the court direct a verdict for the defendant because the Act of Congress upon the provisions of which this alleged cause of action is based is unconstitutional.'"

I.

The Scope of the Act.

The Employers' Liability Act passed April 22, 1908, is as follows:—

EMPLOYERS' LIABILITY ACT.

Passed April 22, 1908.

An Act relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That every common carrier by railroad while engaging in commerce between any of the several States or Terri-

tories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: PROVIDED, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier

of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: PROVIDED, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

SEC. 7. That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled "An Act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employees," approved June eleventh, nineteen hundred and six.

Approved April 22, 1908.

The title of the Act is, "An Act relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases."

It embraces all common carriers by railroad engaging in commerce between the states; it embraces not only such railroads engaged in such commerce upon land, but also such railroads as may carry on their business upon water by means of boats, wharves, etc. The liability extends to the benefits of any person, regardless of the character of his employment, provided he is employed by such carrier in such commerce.

Damages for injury or for death may be recovered in the event of the negligence of the employer or by reason of any defect or insufficiency of any instrumentality due to the negligence of an employer. The rule of *respondeat superior* is extended so as to make the carrier responsible for an injury received by one of its servants in the course of his employment in interstate commerce due in whole or in part to the negligence of *any* of its employees. It avoids a provision for exemption from liability for the negligence of its servants while not engaged in the work of transportation and even while not engaged in the line of their service at all.

A right of action is given in the event of death, and the damages are recoverable without any limitation. The fund so recovered is distributed in a manner which is not in accordance with the provisions of the law of the various states.

The Act provides that contributory negligence shall not bar a recovery, although damages may be diminished by the jury in proportion to the amount of contributory negligence. Apparently, the provision requires the recovery of some damages, although the plaintiff's negligence may be gross and that of his fellow-servant slight.

The Act differs from the Federal Employers' Liability Act, which was enacted in 1906, in certain aspects.

The Act of 1906 provided that every common carrier

engaged in commerce between the states shall be liable to *any* of its employees.

This Act provides that a common carrier by railroad engaged in commerce between the states shall be liable to any person suffering injury while employed by such carrier in such commerce. The Act of 1908 contains an addition to the instrumentalities of commerce by making the carrier responsible for defects in its "boats, wharves or other equipment." The Act of 1906 provided that the mere fact that an employee was guilty of contributory negligence should not bar a recovery while his contributory negligence was slight and that of the employer was gross in comparison.

This Act omits the limitation as to the measure of contributory negligence and provides that the fact that the employee may have been guilty of contributory negligence should not bar a recovery, but that the damages should be diminished by the jury in proportion to the contributory negligence.

The Act under consideration in effect deals with the contract of employment between railroads and their employees. While it grants a recovery in the event of the negligence of the employer or by reason of a defect or insufficiency of the things furnished by the employer, such a provision is but a repetition of the common law or of the statutes as they exist in most of the states. The main feature of the Act is the removal of the defence commonly known as the fellow-servant rule, making the employer responsible for the negligence of all of its employees, independent of any negligence on the part of the employer itself. No matter how diligent the employer may have been in the selection of careful and competent employees, the burden of compensation or the penalty for injury or for death is placed upon him in the event of the negligence of the employees whom he may have selected with all proper care. In this principal aspect, therefore, Congress was not seeking to compensate or to punish for any wrong that had been done by the employer.

Moreover, the fact that the injured employee was guilty of negligence of the grossest kind is not a sufficient defence to the employer, provided there is slight negligence on the part of the employer or on the part of a fellow-employee. To briefly illustrate: Assume that two engineers receive injuries by reason of the collision of their respective trains, the cause of the collision being the disregard on the part of both engineers of signals set against them, under the provisions of this Act the negligence of each engineer as to the other would be the negligence of the company, and if a jury should find that the negligence of each engineer was equal, then the amount of damages that the employer would pay to each engineer would be one-half of the total amount of damages each sustained.

Another consideration of the scope of the Act is important. It provides that the employee himself cannot contract with the employer to modify the provisions of the Act; that is to say, the statute makes the position of certain employees of certain employers dependent not upon the contract, but upon rules fixed by law, which do not pretend to rest upon any well-established principle of justice.

These suggestions do not proceed upon the assumption that they necessarily concern the issue for decision before this court. They are preliminary in their nature, and intended only to briefly illustrate certain aspects of the scope of the Act.

Although the Act may extend the powers of Congress beyond limits it has never approached and invaded what is commonly supposed to be the jurisdiction of the states, although it may burden one class of persons for the benefit of another class, and in its workings be inconsistent with the ascribed intention of Congress, the question before this court is, Has the power to pass this Act been vested in Congress by the Constitution? It is to that subject we desire to invite the consideration of the court.

II.

The Act is not in itself a Regulation of Commerce.

To deny the right of Congress to pass laws that shall regulate commerce or to pass laws plainly adapted to that end is to disregard the provisions of the Constitution and all of the decisions of this court.

> "This power like all others vested in Congress is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution."
>
> *Gibbons* v. *Ogden*, 9 Wh. p. 196.

The Constitution which enumerates the powers of the National government is in itself a limitation upon the power of Congress to legislate. A paramount purpose of the Constitution was to define and to delimit the powers of the National government and the power of the State governments.

> "It cannot be denied that the power of the State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the General Government, nor directly restrained by the Constitution of the United States, and essentially exclusive."
>
> *U. S.* v. *Knight*, 156 U. S. 1, p. 11.

The Constitution guarantees the existence of the powers of the State governments no less than does it guarantee the powers of the Federal government.

> "The same supreme power which established the departments of General Government determined that the local governments should also exist for their own purposes and made it impossible to protect the

> people in their common interests without them. Each of these several agencies is confined to its own sphere and all are strictly subordinate to the Constitution which limits them and independent of other agencies, except as thereby made dependent. There is nothing in the Constitution of the United States which can be made to admit of any interference by Congress with the secure existence of any State authority within its lawful bounds."
>
> Cooley on Constitutional Limitations, Chap. 14, p. 592.

The powers reserved to the states are as sacred as those granted to the Federal government. The means employed by each government to carry into operation the powers granted to it cannot be hampered or impaired by the legislation of the other sovereign government.

Ward v. *Md.*, 12 Wall. 418.

Wherever a purpose of the Constitution is to be accomplished, other purposes of either State or Federal government must be subordinate. A purpose of the Constitution was to secure freedom of commerce between the states. Incidental to the accomplishment of that purpose, Congress has been given power to regulate the flow of interstate commerce. Whenever the result of legislation of the various states has been to obstruct or to interfere with the movement of commerce between the states, this court has determined such legislation unconstitutional. The reason for the decisions rests not in the supremacy of the power of Congress over the power of the states, but rests rather in the paramount power of the Constitution and its purposes.

Congress must therefore so legislate that this important purpose of the Constitution, namely, the promotion of the free flow of commerce between the states, shall be furthered. The Act must be one which plainly, logically,

and directly tends to promote commerce between the states.

It is not argued that, because the Act deals with the relation of master and servant, therefore it may not be a regulation of interstate commerce. There is nothing in that relation in itself that is sacred from the legislation by Congress.

If the Act under consideration is found to be one which naturally and directly tends to promote this flow of commerce between the states, then Congress has the power to legislate.

If, on the other hand, the Act, passed under the guise of legislation affecting interstate commerce, is in reality something different, and its real purpose disconnected from the regulation of such commerce, then Congress has not power to so regulate and the Act is unconstitutional.

To which class does it belong? What is the test for determining whether an Act of Congress is a regulation of commerce within the broad interpretation of the Constitution?

In *Gibbons* v. *Ogden*, 9 Wh. p. 196, Mr. Chief Justice Marshall says:—

> "We are now arrived at the inquiry,—what is this power? It is power to regulate; that is, to prescribe the rule by which commerce is to be governed."

In *Hopkins* v. *U. S.*, 171 U. S. 592:—

> "To treat as condemned by the Act all agreements under which, as a result, the cost of conducting interstate commercial business may be increased would enlarge the application of the Act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the Act."

In *Addyston P. & S. Co.* v. *U. S.*, 175 U. S. 228, the language of the court is as follows:—

> "Under this grant of power to Congress that body, in our judgment, may enact such legislation as shall

declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other innocent purposes, regulate to any substantial extent interstate commerce."

And in the same decision this language is used, p. 229:—

"And that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree, commerce among the States."

In *Hall* v. *DeCuir*, 95 U. S. 487, Mr. Chief Justice Waite said:—

"There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several states. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has been often said, 'legislation may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution.'"

In consideration of this subject in *Field* v. *Barber*, 194 U. S. 623, Mr. Justice Day said:—

"In this day of multiplied means of intercourse between the States there is scarcely any contract which cannot in a limited or remote degree be said to affect interstate commerce. But it is only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of Federal legislation."

Whenever this court has sought to describe the power of the states to legislate upon interstate commerce, the legislation which has been under consideration has always directly and logically affected the intercourse between the states.

In *Hall* v. *DeCuir*, 95 U. S. 485, there was involved the right of the state to determine what coaches should be provided for the different races.

In *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, the question argued was the constitutionality of the state act which imposed a tax on commercial travellers.

In *Brown* v. *Maryland*, 4 Wash. C. C. 378, it was the right of the state to tax imports and exports.

In *Gibbons* v. *Ogden*, 9 Wh. 1, it was the right of the state to directly interfere with interstate transportation.

In *Crandall* v. *Nevada*, 6 Wall. 35, the state was denied the right to tax carriers upon passengers passing through the state.

In *Wabash R.R.* v. *Ill.*, 118 U. S. 557, the question raised was the right of the state to determine charges for the transportation of passengers and freight in interstate commerce.

In *Nashville, etc., R.R.* v. *Alabama*, 128 U. S. 96, the act of the state legislature provided for the examination of locomotive engineers and other employees in respect to their perception of colors.

In *Osborne* v. *Florida*, 164 U. S. 650, the question raised was the right of the state to impose a license tax upon express companies.

In *Pullman Co.* v. *Adams*, 189 U. S. 420, the legislation of the state was attacked because it sought to tax the Pullman Company in its intrastate business.

In *Gladson* v. *Minn.*, 166 U. S. 427, the legislation of the state was questioned in respect to its power in requiring passenger trains to stop at certain stations, and a similar question was raised in *Illinois Central R.R.* v. *Illinois*, 163 U. S. 142.

The cases of

Coe v. *Errol*, 116 U. S. 517,
Cooper Mfg. Co. v. *Ferguson*, 113 U. S. 727,
N. Y., N. H. & H. R.R. v. *New York*, 165 U. S. 628,
L. etc. Ry. Co. v. *Miss.*, 133 U. S. 587,
Hennington v. *Ga.*, 163 U. S. 299,
Telegraph Co. v. *James*, 162 U. S. 650,
Nashville etc. Ry. v. *Alabama*, 128 U. S. 96,

involve the consideration of statutes which bear directly and naturally upon the commerce itself.

It is important to consider the attitude of this court in respect to cases which have involved the constitutionality of state legislation affecting questions of contracts of employment and subjects of analogous character.

In *St. Louis, etc., R.R.* v. *Mathews*, 165 U. S. 1, where recovery was had for damages arising out of fire caused by railroad company, and in *Missouri Pacific Ry.* v. *Humes*, 115 U. S. 512, where recovery was given for the killing of animals by railroads, no suggestion was made that these statutes in any way interfered with interstate commerce.

In *Missouri Pacific Ry.* v. *Mackey*, 127 U. S. 205, the statute of Kansas provided in effect for the recovery of damages by an employee in the event of the negligence of any of its agents or other employees. The court was not invited to consider the question as to whether the statute in any way affected the free movement of interstate commerce.

In *Hopkins* v. *U. S.*, 171 U. S. 578, Mr. Justice Peckham said:—

> "Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term." "But in all the cases which have come to this court there is not one which denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for local facility pro-

vided for the transaction of such commerce." "An agreement may in a variety of ways affect interstate commerce just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct."

In *Williams* v. *Fears*, 179 U. S. 270, p. 278, Mr. Justice Fuller says, quoting *Hooper* v. *California*, 155 U. S. 648:—

> "If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all the contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude state control over many contracts purely domestic in their nature."

Mr. Justice Harlan, in *Adair* v. *U. S.*, 208 U. S. 161, pp. 178 and 180, said:—

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated. . . . We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution."

In *Sherlock* v. *Alling, Admr.*, 93 U. S. 99, it was held that a statute of Indiana giving a right of action to the representative of a deceased where death is caused by the wrongful act of another constituted no encroachment upon the commercial power of Congress, and the language of Mr. Justice Field was as follows:—

> "But, upon an examination of the cases . . . it will be found that the legislation adjudged invalid im-

> posed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on. . . . In the present case no such operation can be ascribed to the statute of Indiana. That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the State for torts resulting in the death of parties injured. . . . In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. . . . It may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-State, or in any other pursuit."

From these cases the conclusion is inevitable that any regulation to come within the meaning of the interstate commerce clause must be direct and logical and not indirect, remote, and merely incidental.

Addyston P. & S. Co. v. *U. S.*, 175 U. S. 211.
Hooper v. *California*, 155 U. S. 648.
Munn v. *Illinois*, 94 U. S. 113.
L. & N. Ry. v. *Kentucky*, 161 U. S. 677.
Lake Shore Ry. v. *Smith*, 173 U. S. 684.

It is for this court to say whether this Act is plainly and logically adapted to secure the free movement of commerce.

If the Act has no real or substantial relation to that commerce, or if it is an invasion of the rights reserved to the state, it is the duty of the court to adjudge the Act unconstitutional.

Mugler v. *Kansas*, 123 U. S. 623.
Minnesota v. *Barber*, 136 U. S. 313.

Can this court say that the natural, direct, and logical tendency of the provisions of the Act is to promote or facilitate commerce between the states? Is the transportation of freight and passengers between the states made safer or more rapid? Does the Act remove any burden upon interstate traffic? Does the Act remove any burden upon interstate transportation?

The test for determining what is a regulation of commerce is not, Does the rule regulate all those *engaged* in interstate commerce? but rather, Does the rule naturally and directly regulate interstate commerce?

No such purport presents itself upon the face of the Act. It does not declare in any respect that it regulates interstate commerce. It prescribes no rule by which commerce is to be governed; it determines no conditions upon which it shall be conducted. It does not seek to secure equality and freedom against discrimination. It does not determine when it shall be free or when it shall be subject to any duties or other burdens.

We quote from the Minority Report on the redraft of this bill known as H. R. No. 2310 of the Sixtieth Congress, First Session:—

> "It is pertinent to inquire in what way does this change of legal relation between the employer and the employee both engaged in interstate commerce affect interstate commerce itself, or in what way does it regulate it. That, as we understand it, is the test."

And again we quote from H. R., Sixtieth Congress, First Session, Report No. 1386:—

> "Under the existing law does the fact that the master is not liable to a co-employee for the negligence of a fellow-servant in any way embarrass, impede or obstruct interstate commerce, or upon the other hand, does the proposed change tend to facilitate, promote or expedite such commerce? We are not aware that anyone pretends that either of these consequences follows. On the contrary, the parties who are most earnestly urging the legislation invariably insist that the fellow-servant doctrine has no connection whatever either theoretically or actual with the safety of the enterprise to which it applies. Will any more freight or passengers be carried in interstate commerce or will freight or passengers be carried more rapidly or more safely after this bill becomes a law than now? No one even pretends to claim it. If this change of legal relation between employer and employee is really a regulation of commerce, it would seem necessary that there must be some point of contact between the regulation and the commerce itself, some place or some phase where the proposed legislation will produce some result upon the commerce regulated at least theoretically or technically, but this place or phase or result no one has ever been able to point out, and in fact, no attempt of that kind so far as we know has been made. Until it can be shown that there is such point of contact or that the regulation regulates in some way in some place or has some connection with some phase of interstate commerce, we feel bound to conclude that the proposed bill is an attempt to regulate the carrier because he is engaged in interstate commerce, which the Court has held could not be done, not a regulation of the commerce itself in which the carrier is engaged, and therefore beyond the domain of Congress. If it is a regulation, must not the regulation be substantial and appreciable and of such a character that it can be ascertained at least in theory? If it is suggested that it is a regulation of an instrumentality of interstate commerce, the same considerations apply. What is the instrumentality that it attempts to regulate, and in what

way and in what manner does it regulate the instrumentality? What aid does the instrumentality receive from this alleged regulation of interstate commerce; from what incumbrance is it relieved? We have never heard of any answer to these questions and until they are answered, we do not believe the legislation can be sustained."

In discussing the two propositions advanced by the plaintiffs in error in the Employers' Liability Cases (207 U. S. 463), the distinction between the regulation of interstate commerce and the regulation of those engaged in commerce is stated in the opinion as follows:—

> "Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons may do,—that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce."

Does not that language describe the purpose and the effect of the Act under consideration? It is legislation which has to do with the relation between employer and employee, and is entirely separate and distinct from interstate commerce itself.

In the opinion of the court in the Employers' Liability Cases, *supra*, this illustration is used:—

> "We think the unsoundness of the contention, that because the act regulates the relation of master and servant, it is unconstitutional, because under no circumstances and to no extent can the regulation of such subject be within the grant of authority to regulate commerce, is demonstrable. We say this because we fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce

> or within the authority given to use all means appropriate to the exercise of the powers conferred. To illustrate: take the case of an interstate railway train, that is, a train moving in interstate commerce, and the regulation of which therefore is, in the nature of things, a regulation of such commerce. It cannot be said that because a regulation adopted by Congress as to such train when so engaged in interstate commerce deals with the relation of the master to the servants operating such train or the relations of the servants engaged in such operations between themselves, that it is not a regulation of interstate commerce."

The force of the illustration is not controverted. If the regulation of any train engaged in interstate commerce was such that it directly and logically affected the movement of commerce between the states and that regulation incidentally affected the liability of the master to the servant operating such train, there is no denial of the power of Congress to so regulate.

On the other hand, to require all trainmen operating a train engaged in interstate commerce to be a member of a labor union would not be a regulation of interstate commerce. To legislate so that all employees engaged in the operation of an interstate train should not assign their wages would bear no relation to the flow of commerce between the states.

In the decision of *Adair* v. *U. S.*, 208 U. S. 161, this language is used:—

> "So in regard to Employers' Liability Cases (207 U. S. 463) decided at the present term. In that case the court sustained the authority of Congress under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employés in such interstate commerce, in cases of personal injuries received by employés while actually engaged in such commerce. The decision on this point was placed on the ground that a rule of that character would have direct reference to the conduct of interstate commerce,

and would, therefore, be within the competency of Congress to establish for commerce among the States, but not as to commerce completely internal to a State."

It is respectfully submitted that an examination of the opinions in the Employers' Liability Cases fails to disclose in what respect the rule has direct reference to or bearing upon the *conduct of interstate commerce.*

In *Adair* v. *U. S.*, supra, the court held that it was not within the power of Congress to make it a criminal offence against the United States for a carrier engaged in interstate commerce or an agent thereof to discharge an employee simply because of his membership in a labor organization. The court held that such an act did not *directly* and *substantially* affect interstate commerce.

Such an Act would clearly regulate the contract of employment between the master and servant upon trains that were engaged in interstate commerce. Indeed, it was urged in the argument with great earnestness that its relation to interstate commerce was apparent, that the manifest purpose of the act was to protect interstate commerce by the avoidance of strikes and lockouts.

It was urged that the Act would remove labor difficulties and would further tend to prevent interruptions in interstate commerce. But the court decided that there was no substantial relation to interstate commerce with which an employee is connected, and his membership in a labor organization. Is the relation of the rule of liability which shall be enforced after an injury has been sustained by an employee connected with interstate commerce, any more real or substantial?

In support of the Act under consideration the only argument that has been advanced to show any connection between the possible tendency of its provisions and interstate commerce has been in the direction of making safer transportation. It is argued that, inas-

much as a liability is imposed upon railroads arising not out of their own negligence, but by reason of the negligence of some of their employees, the railroads will therefore seek to employ men who are more careful. By reason of the employment of more careful employees the safety of interstate commerce will thus be promoted.

This is a most unsatisfactory method of reasoning, and the connection sought to be established is vague and remote.

If there was any such purpose on the part of Congress, there is no indication upon the face of the Act. Has this court any right to assume any such connection, when upon careful examination the tendency of the provisions of the Act will be in a direction not in the line of safer transportation? A provision which permits employees to recover in the face of their own contributory negligence does not naturally tend toward safer transportation. Safe transportation is accomplished only by the exercise of care and watchfulness by the employees themselves.

No act can be said to promote the exercise of that high degree of care which is required of railroad employees which permits compensation for failure to exercise such care.

Railroad employees, as they exist to-day, are a self-governing body: their compensation, the performance of their duties, their obligations, in no small sense rest with them. It is important in the interests of safety of transportation that they should feel not only their own responsibility for the exercise of care, but also the responsibility of working with men whose conduct shall be free, so far as possible, from negligence.

Safety is not promoted by lessening their sense of responsibility in either respect.

The conclusion that increasing the amount of damages which a railroad company must pay for the acts of carelessness of its men in their relation to each other will promote safe transportation is unsound and untrue.

If it can be said that this Act has a real and substantial relation to the flow of interstate commerce, and that Congress has the power to impose liability upon a carrier to its employees under its power to regulate commerce, then *it has the same power to remove the liability of a railroad to its employees.*

Should Congress, with the possible purpose of reducing the expenses of carriers engaged in interstate commerce, pass an act providing that no railroad company should be liable in damages to its employees by reason of its or their negligence, could such an act be justified on the ground that it was a regulation of interstate commerce?

Giving to words their accepted meaning, the forces of nature operating in their ordinary way, it is impossible to find that this Act directly, naturally, or logically promotes or tends to promote or to facilitate commerce between the states. The fallacy of the supporters of this Act is that, because the Act seeks to regulate the relations of persons engaged in interstate commerce, therefore it does regulate the business of interstate commerce.

Cases arising under Maritime Law.

It is not denied that Congress has legislated upon the relations of owners of ships to the owners of goods, upon the relations with passengers and employees. The source of that power is not found in the right of Congress to regulate commerce, but arises in Article III. of the Constitution, which is,—

> "The judicial power shall extend to all cases of admiralty and maritime jurisdiction."

There are cases,

> *Craig* v. *Insurance Company*, 141 U. S. 638,
> *Butler* v. *Boston S.S. Co.*, 130 U. S. 548,

in which the court has said that legislation by Congress affecting commerce by water had for its source of power

the commerce clause. It is from a totally different aspect in respect to the constitutional powers of State and Federal governments that we view commerce upon land and commerce upon water.

In *Railroad* v. *Maryland*, 21 Wall. 456, the court said:—

> "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the National legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair, and management, to State regulation and control."
>
> *B. & O. R.R.* v. *Maryland*, 21 Wall. 456.

In re Garnett et al., 141 U. S. 1, the constitutionality of an Act of Congress relating to the limitations of the liability of owners in vessels was attacked. The court said:—

> "It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations,

and among the several states, in order to find authority to pass the law in question. The Act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends."

In *The Daniel Ball*, 10 Wall. 557, Mr. Justice Field said:—

"It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a State; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a State on which grain or fruit is transported to a distant market.

We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation."

In the case of *The Roanoke*, 189 U. S. 185, the court said:—

"Bearing in mind that exclusive jurisdiction of all admiralty and maritime cases is vested by the Constitution in the Federal courts, which are thereby made judges of the scope of such jurisdiction, subject, of course, to Congressional legislation, the Statute of the State of Washington, in so far as it attempts to control the administration of the maritime law by creating and superadding conditions for the benefit of a particular class of creditors, and thereby depriving the owners of vessels of defences to which they would otherwise have been entitled, is an unlawful interference with that jurisdiction, and to that extent is unconstitutional and void."

In *The Lottawanna*, 21 Wall. 558, the language of the court was as follows:—

> "Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law, and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrolment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime."

These decisions have been cited somewhat at length in order to show that Acts which are held constitutional when applied to maritime regulation are not necessarily constitutional when applied to commerce by land.

Safety Appliance Law.

The opinion of Mr. Justice Moody in the Howard and Brooks cases, 207 U. S. 463, states:—

> "If the Statute now before us is beyond the constitutional power of Congress, surely the Safety Appliance Act is also void, for there can be no distinction in principle between them."

It would seem that the distinction is well marked. The title of the Act is to promote the safety of employees and travellers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with certain appliances for the safety of their employees and the travelling public. There a plain purpose of the Constitution is served. It is to make transportation between the states safer. Not only is it justified

on that ground, but by reason of its provisions it was necessary that there should be uniformity of legislation. It was essential that states should not legislate as to the instrumentalities which should be used by railroads in complying with this Act. Provision was made for the use of automatic couplers and for air brakes. It is conceivable that different states might pass different laws as to the form of the various couplers or air brakes. Such legislation would interfere with interstate commerce and place a burden upon free and rapid transportation. The legislation was national in its character and required uniformity of regulation.

In *United States* v. *Southern Ry. Co.*, 164 Fed. Rep. 351, the court said:—

> "The distinction between the principle decided in the Employers' Liability cases and the safety appliance acts was not drawn in question when the former cases were pending before the Supreme Court of the United States, and I feel constrained to believe that the statement above quoted from Mr. Justice Moody was for that reason unadvisedly made; for the distinction between the two acts, with due respect to the learned justice, is in my humble judgment very marked."

III.

The Act invades the Sovereignty of the States.

The Act prescribes no regulation of commerce either in respect to transportation or in respect to traffic. It regulates an ordinary domestic relation, the contract of employment between a railroad engaged in interstate commerce and its employees so engaged. This is a relation peculiarly within the exclusive jurisdiction of the states.

In the American constitutional system the power to establish the ordinary relations of police has been left with the individual states, and cannot be assumed by the national government.

In *Trade Mark Cases*, 100 U. S. 96, Mr. Justice Miller said:—

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States or with the Indian tribes. If not so limited, it is in excess of the power of Congress."

In *Barbier* v. *Connolly*, 113 U. S. 27, the court said:—

> "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Heretofore it has been supposed that the states had these powers described in the above quotation. Their courts have interpreted the common law of the land and have legislated in respect to the affairs of their citizens in the ordinary relations of life. They have passed laws affecting the relation of husband and wife, guardian and ward, landlord and tenant, master and servant, and upon every conceivable subject which has to do with the domestic relations of their citizens. The power to so legislate is as sacred as the power of Congress to regulate interstate commerce, and unless this purpose of the Constitution to promote commerce between the states is plainly being served, then Congress has no right to so legislate that it may invade the powers of the states to regulate their domestic affairs.

In *Hooper* v. *California*, 155 U. S. 648.

If Congress has the power to determine the liability

of a railroad company to its employees simply because both are engaged in interstate commerce, then it has the same right to regulate the liability of a shipper to its employee when engaged in interstate commerce. The term "engaged in interstate commerce" is so comprehensive and far-reaching that it includes nearly every known industry. If Congress has the right to legislate upon matters affecting any person engaged in interstate commerce, then there is scarcely any relation upon which it cannot legislate. The states would be shorn of their power to regulate their domestic affairs.

In this very Act Congress has seen fit to give an action where the common law denied it. It has allowed recovery for injury resulting in death, which is inconsistent with the laws of many states. It has given an action which is not in accord with natural justice, nor in harmony with the decisions of many of the state courts. If this Act is deemed constitutional and those engaged in interstate commerce, comprising nearly every known industry, can be regulated in respect to the employment of servants, the rights and duties of their servants can be regulated. If they can be regulated as to their employment, they can be regulated in every other relation which Congress may think affects trade and commerce between the states.

This court in its decision has exercised the utmost care to preserve the rights and powers of the states. In the early case of *Houston* v. *Moore*, 5 Wh. 1, p. 48, Mr. Justice Story uses this language:—

> "Nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the National Government beyond what the people have granted by the constitution."

The duty of this court was again reaffirmed in the

recent case of *Keller* v. *United States*, 213 U. S. 138, by Mr. Justice Brewer in these words:—

> "In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away from them. Although Congress has not largely entered into this field of legislation, it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution. While the Acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in *Texas* v. *White*, 7 Wall. 700, that 'the Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States.'"

In *Leisy* v. *Hardin*, 135 U. S. 100, Mr. Chief Justice Fuller said:—

> "These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government."

In *Pa. R.R.* v. *Knight*, 192 U. S. 21, this court upheld the taxing power of the State of New York, although it might remotely affect interstate commerce. Mr. Justice Brewer used this language:—

> "As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the

porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?"

In *Chicago, etc., R.R.* v. *Solan*, 169 U. S. 133, the court held that regulating the liability of a common carrier engaged in interstate commerce to one of its passengers travelling within the state was not a regulation of interstate commerce. The court used this language:—

"A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable, according to the law of the State, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the State has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce."

In *United States* v. *E. C. Knight Co.*, 156 U. S. 1, the court said:—

"It is vital that the independence of the commercial power and of the police power, and the de-

limitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police."

In *Northern Securities Co.* v. *United States*, 193 U. S. 197, Chief Justice Fuller and Justices White, Peckham, and Holmes quoted from *L. & N. R.R.* v. *Kentucky*, 161 U. S. 677, with approval:—

"It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."

The right of Congress to regulate the relation of master and servant to the extent that such regulations applied to intrastate commerce was denied by this court in the *Employers' Liability Cases*, 207 U. S. 463.

The constitutionality of this Act was under consideration by the Supreme Court of Connecticut in the case of *Hoxie* v. *N. Y., N. H. & H. R.R. Co.*, 82 Conn. 352, and the language of the court expressed by Chief Justice Baldwin was:—

> "Thus far we have refrained from discussing the constitutionality of the Act, except as to the single objection that, if it can be considered as intended to give an action in the courts of the States, it goes in that respect beyond the powers of Congress. In our opinion it also transcends them otherwise. . . . Except so far as the Act is a regulation of commerce between the States, its enactment was beyond the power of Congress. That it remotely affects such commerce is not sufficient, if that result is only to be secured by invading the settled limits of the sovereignty of the States with respect to their own internal police.
>
> A statute enacted in a jurisdiction where a written constitution obtains, is *prima facie* presumed by its courts, if its validity be questioned before them, to be in accord with that constitution. Whether such a presumption exists either in a State court or in those of the United States, in favor of an Act of Congress which, if valid, reduces the limits within which the sovereignty of the States has for more than a century been freely exercised, and especially if this Act, which by its title does not purport to be a regulation of interstate or foreign commerce, but simply to relate 'to the liability of common carriers by railroads to their employees in certain cases,' we need not inquire. If the statute under review has the support of such a presumption, that support is overthrown by the considerations previously stated."

IV.

The Act regulates the Relation of Master and Servant as to Things which are not exclusively Interstate Commerce.

The first section of the Act provides:—

> "That every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment."

The language used in the Employers' Liability Act of 1906 in describing the source of injury is as follows:—

> "which may result from the negligence of any of its officers, agents or employees," etc.

It is apparent, therefore, that Congress has used precisely the same words to describe that class of employees for whose negligence the master shall be liable. The Act substantially re-enacts in this particular the words of the previous Employers' Liability Act, and must be presumed to have been drafted with knowledge of the judicial construction which those words had received. Indeed, referring to the Minority Report of the Judiciary Committee, pages 4546–4552 of the Congressional Record, the attention of Congress was called to the fact that Congress could neither grant a right of action to an intrastate employee growing out of the act of an inter-

state or intrastate employee, nor a right of action in favor of an interstate employee growing out of an act of an intrastate employee.

To quote the construction of the word "any" of Mr. Justice White in the *Employers' Liability Cases*, 207 U. S. 463:—

> "As the word 'any' is unqualified, it follows that liability to the servant is co-extensive with the business done by the employers whom the statute embraces; that is, it is in favor of any of the employees of all carriers who engage in interstate commerce. This also is the rule as to the one who otherwise would be a fellow-servant by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant would exist although the injury for which the carrier is to be held resulted from negligence of any of its officers, agents or employees."

Conceding of necessity that an interstate carrier is also an intrastate carrier and that employees upon the same train may be engaged at the same time in interstate and intrastate commerce, therefore the statute confers a right of recovery upon employees engaged in intrastate commerce, and thus touches the relation of master and servant as to matters concerned with intrastate commerce.

The right of the state to regulate its commerce within its own borders is paramount to the power of Congress to regulate such commerce.

In *The License Cases*, 5 Howard, 504, Mr. Justice Taney said:—

> "It is equally clear that the power of congress over this subject does not extend further than the regulation of commerce with foreign nations and among the several States; and that beyond these limits, the States have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every State, therefore, may regulate its own internal traffic, according to its own

judgment, and upon its own views of the interest and well-being of its citizens."

Again, granting that an interstate carrier is also an intrastate carrier, the statute confers a right of recovery upon employees engaged in interstate commerce as a result of injuries arising from the negligence of employees, *whether engaged in interstate commerce or in intrastate commerce.*

Conceding the force of the argument that the Act in dealing with the relation of master and servant has a real and substantial relation to interstate commerce, then the relation to intrastate commerce is no less real or substantial.

The Employers' Liability Act of 1906 was found to be unconstitutional because the Act included subjects beyond the power of Congress to regulate, because it regulated in effect the relation of master and servant as to matters relating to commerce exclusively within the state. Mr. Justice White in his opinion points out (page 498) that the Act of 1906 not only imposed a liability upon all common carriers in favor of any of their employees, but also that the liability was imposed "without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury," and that therefore that included subjects wholly outside of the power of Congress to regulate. A fair interpretation of the language of the court is that not only should the employee who is injured be engaged in interstate commerce at the time of the injury, but that the employer and the employee from whose act negligence arises should also be engaged in interstate commerce. The language of the court upon page 501 is important:—

"As the Act before us by its terms relates to every common carrier engaged in interstate commerce

> and to any of the employees of every such carrier thereby regulating every relation of a carrier engaged in interstate commerce with its servants and of such servants among themselves, we are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power to regulate."

Granting the coexistence of an interstate and an intrastate business, the provisions of the Act under consideration must of necessity regulate the relations that arise out of purely intrastate business. An employee engaged in interstate commerce may be injured by reason of the negligence of an employee engaged in purely intrastate commerce. Under the common law the master is not responsible in damages for the injury. By reason of the provisions of this statute the carrier carrying on an interstate as well as an intrastate business becomes responsible in damages for the act of his servant who is employed exclusively in intrastate business. It is apparent, therefore, that the Act touches directly and seeks to regulate the relation of master and servant as to intrastate business.

In *Hoxie* v. *N. Y., N. H. & H. R.R. Co.*, 82 Conn. 352, p. 368, Mr. Justice Baldwin says:—

> "An interstate carrier is generally also an intrastate carrier. It may have a considerable force of officers, agents, or employees engaged in business that is wholly local. Does the power to regulate commerce between the States go so far as to warrant imposing on a carrier responsibility to a servant engaged in that business for the consequences of the negligence of another of its servants, occurring when the latter was not engaged in it, nor indeed in any business for the common employer? If a freight clerk, whose duties are confined to keeping tally of goods consigned from one point to another in the same State, in an office devoted to that purpose,

should carelessly discharge a rifle, a bullet from which should hit a brakeman on an interstate train, a mile away, we are of opinion that it could not fairly be deemed a regulation of interstate commerce to hold the common employer responsible for the injury. . . . Nor would it be such a regulation as to make an interstate railroad company liable to a train-hand who, while going to work, was accidentally struck by an automobile directed by one of its vice-presidents or land agents while on a pleasure drive.

It is to be observed in this connection, also, that the Act is not concerned solely with cases of injuries to train hands. It includes those to any person who is employed by the carrier in interstate commerce, and gives an action to his 'or her' personal representative. A waitress employed by an interstate railroad in a railroad restaurant, where local custom does not exist or is not served, could recover on the statute for an injury received from the negligence of a man hired by the carrier for some purpose purely of a local character."

It must be conceded that trains running between states are engaged to the same extent in intrastate traffic as in interstate traffic, and, when Congress seeks to regulate those engaged in interstate commerce, by that very act Congress regulates those who are engaged in intrastate commerce. When Congress seeks to impose some new rule of liability upon employers engaged in interstate commerce, they are imposing a rule of liability to the same extent in effect upon those who are engaged in intrastate commerce. They are denying the authority of the state to regulate its domestic commerce, which is in no respect inferior to the power of Congress to regulate inter-State commerce.

In the recent case of *Zikos* v. *Oregon R. & N. Co.*, 179 Fed. Rep. 893, this interesting construction is made of the language in the Act under consideration, to which argument has been directed:—

"That it was the purpose to make an interstate carrier liable to an employé engaged in interstate

commerce for the negligence of a fellow servant, also engaged in such commerce, is beyond controversy."

This is not in accord with the construction of the statute in *Employers' Liability Cases*, 207 U. S. 463. The words "engaged in trade or commerce" qualify the words "common carrier," and none other. It is only necessary that the injured employee should be engaged in interstate commerce, not that the employee whose negligence causes the injury be engaged in or have connection with interstate trade or commerce. The cause of action arises from the negligence of any employee without qualification.

V.

The Act is Unconstitutional in that it violates the Fifth Amendment to the Constitution.

The Fifth Amendment provides in part as follows:—

> "No person shall . . . be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

This amendment is a limitation upon the power of Congress.

The Fourteenth Amendment, which is a limitation upon the power of the states, provides:—

> "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The purpose of both amendments is to secure the existence of fundamental justice and to prevent capricious and arbitrary legislation whereby unfair burdens are placed upon one class of persons. If such legislation be passed by any of the states, it conflicts with the

Fourteenth Amendment. If it is an Act of Congress, it conflicts with the Fifth Amendment.

In this respect the construction placed upon one amendment is applicable to the other.

County of San Mateo v. *So. Pac. Ry.*, 13 Fed. Rep. 151.
Dent v. *W. Va.*, 129 U. S. 114.
Sinking Fund Cases, 99 U. S. 718.
French v. *Barber Asphalt Co.*, 181 U. S. 324.
Munn v. *Ill.*, 94 U. S. 123.
Giozza v. *Tiernan*, 148 U. S. 657.
Hurtado v. *California*, 110 U. S. 516.

This purpose is well described in the opinion of Mr. Justice Brewer in the case of *Gulf, Colorado, etc., R.R.* v. *Ellis*, 165 U. S. 150, which arose out of the question of the constitutionality of a statute of Texas whereby railroad companies were placed under a penalty for failing to pay certain debts. The opinion is as follows:—

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action.
>
> It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States." *Santa Clara County* v. *So. Pac. R.R.*, 118 U. S. 394, and other cases. "The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true," citing *Hayes* v. *Missouri*, 120 U. S. 68; *Railroad* v. *Mackey*, 127 U. S. 205, and other cases; "yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

In *Vanzant* v. *Waddel*, 2 Yerger, 260, Catron, J., speaking for the Supreme Court of Tennessee, declared: 'Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.'"

The Act violates the Fifth Amendment because:—

(1) It imposes upon common carriers by rail engaged in interstate commerce liabilities which are not imposed upon others engaged in interstate commerce;

(2) It deprives common carriers by rail engaged in interstate commerce of defences which are available to others engaged in interstate commerce;

(3) It limits the powers of contract of common carriers by rail engaged in interstate commerce in their relations with their employees, and does not limit such powers of others engaged in interstate commerce.

The scope of the Act in its application and operation is of the broadest character. Congress sought to render liable "every common carrier by railroad while engaging in commerce" between the states "to any person suffering injury" while so employed. Any doubt as to its construction is removed by the language of Mr. Justice White in *Howard* v. *R.R. Co.*, supra:—

> "The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce."

Congress sought no reasonable or proper basis for this classification, although their attention was directed to the necessity for such a distinction. We quote from the Congressional Record, page 4433:—

> "Mr. LITTLEFIELD. Now, Mr. Speaker, in order to raise this precise question presented by the second question raised by the minority views, I ask unanimous consent to go over and have considered as pending the following amendment, in order that it may appear on the record that this question was specifically called to the attention of the House before it passed legislation.
>
> Mr. STERLING. I object, Mr. Speaker.
>
> Mr. LITTLEFIELD. Can I not state the amendment? I will state it in my own time. It is as follows: After the word 'commerce' in line 10, page 1, section 1, the words, 'in service directly connected with the operation of the road.' I understand that it is objected to.
>
> Mr. STERLING. I object.
>
> Mr. LITTLEFIELD. And I further ask unanimous consent for the same reason, so that it may appear that the question was specifically presented to the House to amend by inserting after the word 'carrier' in line 4, page 2, the words, 'who at the

time of such negligence are engaged in interstate commerce.'"

The following language of Mr. Paine, the majority leader, appears on page 4434 of the Record:—

> "When the former bill was before the House, I said to the gentlemen around me that I feared it was unconstitutional, but it meets the approbation of the counsel for the locomotive engineers and therefore I voted for it. I say to-day that I fear this bill may receive the same decision from the Supreme Court of the United States when it gets there, but I shall vote to-day as I voted a year and a half ago, in favor of passing an employers' liability act, and gentlemen, we will go on with the legislation of this country and the majority will decide in their own good time and in despite any let or hindrance of the gentleman from Mississippi and his voting trust which it is reported he had organized on that side last Saturday to stand by him in every obstructive method to stop legislation; notwithstanding that we will go on and write on the statute book just what we on this side of the House desire."

There can be little doubt but that it was the intention of Congress to impose a liability in favor of all employees of carriers by rail engaged in interstate commerce without qualification or restriction as to the character of their business or hazards or risks to which they were subjected. Indeed, Congress was not considering carriers by rail alone, but by the language of Section 1 an action arises for defects "in boats, wharves or other equipment." Therefore, in considering the scope of this Act, are we not forced to conclude that Congress is not seeking to regulate interstate commerce by regulating the hazardous business of operating a railroad, but that Congress is attempting to regulate carriers by rail in all of their departments, and that liability should be imposed in favor of *all* employees while engaged in interstate commerce?

To again revert to the language of Mr. Justice White in the *Employers' Liability Cases, supra*:—

> "Thus the liability of a common carrier is declared to be in favor of 'any of its employees.' As the word 'any' is unqualified, it follows that liability to the servant is co-extensive with the business done by the employers whom the statute embraces."

Giving, then, the construction to the scope of the present Act that from the debates in Congress and from the language of Mr. Justice White we are bound to give, it is apparent that the liability is in favor of every employee engaged in interstate commerce, regardless of the character of his employment or the risks which are incident to that employment.

The Fifth Amendment insures equal protection of the laws. It prevents distinctions and classifications, unless the classifications are made upon some basis which is natural and not arbitrary.

> "Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."
>
> *Gulf, Colorado, etc., R.R.* v. *Ellis*, 165 U. S. 150.

Referring to the language used by Mr. Justice White in the *Employers' Liability Cases*, supra:—

> "We deem it unnecessary to pass upon the merits of the contentions concerning the alleged repugnancy of the statute, if regarded as otherwise valid, to the due process clause of the Fifth Amendment to the Constitution, because the act classifies together all common carriers. Although we deem it unnecessary

> to consider that subject, it must not be implied that we question the correctness of previous decisions noted in the margin, wherein state statutes were held not to be repugnant to the Fourteenth Amendment, although they classified steam railroads in one class for the purpose of applying a rule of master and servant."

The cases that are cited in the margin are:—

> *Missouri Pacific Ry.* v. *Mackey*, 127 U. S. 205.
> *Minneapolis, etc., Ry.* v. *Herrick*, 127 U. S. 210.
> *Chicago, etc., R.R.* v. *Pontius*, 157 U. S. 209.

The first two cases cited are substantially identical.

In *Missouri Pacific Ry.* v. *Mackey*, supra, a statute which made every railroad company liable for all damages done to any employee by any other fellow-employee, thus changing the so-called "fellow-servant rule," was held constitutional. The statute was invoked in favor of a fireman who was injured while he was employed in the movement of cars from one point to another. The language of the court is as follows:—

> "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations having for its object the protection of their employees, as well as the safety of the public."

Here is a sufficient and satisfactory reason for classification, made on the basis of danger and of the character of the service rendered.

Does it follow because it was held in this case that the hazardous character of the business required special legislation that the same reason exists for classification in favor of those who are employed by railroad companies, and yet who are in no wise connected or concerned with the actual movement and operation of trains and who undergo risks that are no greater than those incident to ordinary occupations?

The case of *Chicago, etc., R.R.* v. *Pontius* arose out of injuries received by a bridge carpenter while employed by a railroad company in assisting in unloading lumber on a car for transportation. It was held that the plaintiff was an employee of the railroad company within the meaning of the general statute of Kansas, which made railroad companies in that state liable to their employees for injuries received through the negligence of fellow-employees. The language of Mr. Justice Fuller on page 211 is significant:—

> "As to the objection that the law deprived railroad companies of the equal protection of the laws, and so infringed the Fourteenth Amendment, this court held that legislation which was special in its character was not necessarily within the constitutional inhibition, if the same rule was applied under the same circumstances and conditions; that the hazardous character of the business of operating a railroad seemed to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public; that the business of other corporations was not subject to similar dangers to their employés, and that such legislation could not be objected to on the ground of making an unjust discrimination since it met a particular necessity and all railroad corporations were, without distinction, made subject to the same liabilities.
>
> It is now contended that the plaintiff was a bridge builder; that the legislation only applied to employés exposed to the peculiar hazards incident to the use and operation of railroads; that the railroad company could not be subjected to any greater liability to its employés who were engaged in building its bridges than any other private individual or corporation engaged in the same business; and that the statute had been so construed in this case as to make the company liable to its employés when engaged in building its bridges, notwithstanding bridge building was not accompanied, and had not been treated by legislation as accompanied, by peculiar perils, thus discriminating against the particular corpora-

tion irrespective of the character of the employment, in contravention of the Fourteenth Amendment.

But the difficulty with this argument is that the state Supreme Court found upon the facts that, although the plaintiff's general employment was that of a bridge carpenter, he was engaged at the time the accident occurred, not in building a bridge but in loading timbers on a car for transportation over the line of defendant's road."

In this case this court was bound by the limitation of the State court in its construction. It is in support of our contention that there must be a natural basis for the classification, and the inference is fair that but for the limited construction of the State court the Act would have been held unconstitutional.

Regulations in respect to hazards of employment were supposed to be peculiarly within the powers of the states.

But as a basis for classification by special legislation of Congress, has this court any right to *assume* that the majority of the members of the class who are favored by this legislation are exposing their lives to extraordinary risks when the facts are to the contrary? *This court will determine for itself the propriety of the classification.*

Lochner v. *New York*, 198 U. S. 45.

To better comprehend the scope of the Act in its application, we may refer to the language of Mr. Justice White in the *Employers' Liability Cases, supra*:—

> "Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. Take again the same road having shops for repairs, and it may be for construction work, as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest besides the possibility of its being engaged in other independent enterprises."

The stenographer in the president's office, the bookkeeper in the treasurer's office, the accountant in the

auditor's department, the checking clerk in the freight department, the carpenter engaged in repairing the cars, the machinist in the shop, the telegraph lineman, the claim agent, the freight solicitor in the city office,—all form a part of those engaged in the business of commerce between the states; yet to describe them as persons engaged in a hazardous occupation is absurd to a degree.

Is it for this court to assume that those actually engaged in the movement and operation of trains form a greater part or even one-half of the total number of employees engaged in the business of interstate commerce of any carrier by rail so engaged?

There is a class of cases where the constitutionality of Employers' Liability Acts has been tested by the courts of the different states. Although the language has been general in its application, by "judicial construction" it has been limited by the state courts to apply to that particular class of employees *whose employment was hazardous.*

Deppe v. *R.R.*, 36 Iowa, 52.
Schroeder v. *R.R.*, 41 Iowa, 344.
Smith v. *R.R.*, 59 Iowa, 73.

Such construction will not meet with the approval of this court.

> "So far as the face of the statute is concerned, the argument is this,—that because the statute says carriers engaged in commerce between the states, etc., therefore the Act should be interpreted as being exclusively applicable to the interstate commerce business and none other of such carriers, and that the words 'any employee' as found in the statute, should be held to mean any employee when such employee is engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it."
>
> *Employers' Liability Cases*, supra.

In *Johnson* v. *St. Paul & Duluth R.R.*, 43 Minn. 222, the court had under consideration the constitutionality

of the Employers' Liability Act of the State of Minnesota, and the language of the court is important in its bearing upon the Act under its discussion:—

> "Neither would it relieve the Act from the imputation of class legislation that it applies alike to all railroads; it has been sometimes loosely stated that special legislation is not class, if all persons brought under its influence are treated alike under the same conditions. But this is only half the truth. Not only must it treat alike under the same conditions all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions. . . . Therefore, if a distinction is to be made between railway corporations and other employers as respects their liability to their employees, it must be based upon some difference in the nature of the employment and can only extend to cases where such difference exists. . . . Therefore, after mature consideration, our conclusion is that, if any limitation is to be placed by the courts upon the application of this statute (and on constitutional grounds there must be), the only one which will furnish any definite or logical rule is to hold that it only applies to those employees who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers."

Does a distinction furnish a proper basis for the classification which denies to a common carrier by rail engaged in interstate commerce a defence at common law in its relations with its employees who are engaged in repairing or constructing cars when it permits the defence in actions arising in shops of a company engaged in car building and in interstate commerce? Is there any just reason for favoring employees of a railroad company engaged in interstate commerce, whose occupations are purely clerical, and in denying to other employees similarly employed by other carriers engaged in interstate commerce the same privilege? Is a classification constitutional which makes common carriers by rail en-

gaged in interstate commerce liable to any of its servants so engaged, although the hazards of the occupation do not concern a majority of the employees? The classification is arbitrary because it abolishes the fellow-servant rule as to all of the employees without regard to the character of service.

In subjecting one class of common carriers to heavier responsibilities, Congress has not attempted to follow the guiding principle of an impartial application of its legislation to all engaged in interstate commerce. The messenger employed by express companies is exposed to the same dangers as the baggage-master employed by the railroad. The perils of navigation upon water are no less than those of transportation by rail; yet steamship companies engaged in interstate commerce are free from the burdens of this Act.

The Act does not apply to telegraph companies or telephone companies, yet all have been held to be engaged in interstate commerce.

In *Johnson* v. *St. Paul & Duluth R.R.*, supra, the court said:—

> "One rule of liability cannot be established for railway companies merely as such and another rule for other employers under like circumstances and conditions."

In *Akeson* v. *R.R.*, 106 Iowa, 54, the court said:—

> "The purpose of the law makers was evidently not to make men, because employed by railroad companies, favorites of the law, but to afford protection owing to the peculiar hazards of their situation."

The Act has discriminated against railroads engaged in interstate commerce in respect to boats and wharves. The defendant in this case operates many boats and has many wharves. Its exchange of freight at its westerly terminus is by means of floats operating in the harbor of New York. Thus there is a discrimination in favor of other carriers in interstate commerce who are not carriers

by rail. An additional burden is placed upon railroads who own and operate boats.

Does a distinction furnish a proper basis for classification which imposes a special liability upon this defendant and certain other railroads engaged in interstate commerce, which does not apply to other owners of boats and wharves engaging in the same degree and under the same conditions in interstate commerce?

Attention is called to the opinion of the Attorney-General of the United States given to the President upon April 21, 1908:—

> "It must be admitted that in one respect the language of Section 1 of the present bill suggests a possible discrimination. It makes the altered responsibility of the common carrier by railroad depend upon any defect or insufficiency due to its negligence in its . . . boats, wharves or other equipment. It may be argued that a railroad company maintaining a line of ferry boats, say from Jersey City to New York, would thereby be subject to a different responsibility through any defect in its boats or wharves from what would be imposed upon owners of a line of ferry boats not belonging to a railroad, although running in all other respects under precisely similar conditions."

The Attorney-General then proceeds to argue that the language of Mr. Justice White in the *Employers' Liability Cases* justifies him in the belief that these considerations affect the expediency and not the constitutionality of the Act. The language of Mr. Justice White, referred to by the Attorney-General, is as follows:—

> "The statute, it is urged, discriminates against all who engage as common carriers in interstate commerce, and since it makes them responsible (without limit as to the amount) to one servant for an injury suffered by the act of a co-servant, even in a case where the negligence of the injured servant has contributed to the result, hence placing all employers who are common carriers in a disfavored, and all their employees in a favored, class."

Then the Attorney-General omits certain language of the learned justice and continues:—

> "Even for the sake of argument, conceding the correctness of these suggestions, we at once dismiss them from consideration as concerning merely the expediency of the Act and not the power of Congress to enact it."

The sentence omitted by the Attorney-General in quoting the opinion of Mr. Justice White is as follows:—

> "Indeed it is insisted the statute proceeds upon contradictory principles since it imposes the increased responsibility just stated upon the master, presumably in order to make him more careful in the selection of his servants, and yet minimizes the necessity for care on the part of the servant by allowing recovery although he may have been negligent."

Fairly considered, the quotation from the opinion of Mr. Justice White gives no support to the theory that railroad carriers may be classified merely because they are railroad carriers and without regard to the hazards of their business.

Inasmuch as the decision in *Louisville & Nashville R.R.* v. *Melton*, 218 U. S. 36, was made after the foregoing argument had been printed, its bearing upon the Act in question is now considered. The facts involve the constitutionality of the Employers' Liability Act of Indiana as applied to employees of railroads engaged in work other than the direct operation of the railroad. The defendant in error received serious and permanent injuries while in the employ of the plaintiff in error as a bridge carpenter, owing to the breaking of a defective chain. The argument of the plaintiff in error as expressed by Mr. Justice White in his opinion is as follows:—

> "The idea evidently intended to be expressed by the argument is, that although, speaking in a general sense, it be true that the hazards arising from the

> operation of railroads are such that a classification of railroad employees is justified, yet as in operating railroads some employees are subject to risks peculiar to such operation and others to risks which, however serious they may be, are not in the proper sense risks arising from the fact that the employees are engaged in railroad work, the legislative authority in classifying may not confound the two by considering in a generic sense the nature and character of the work performed by railroad employees collectively considered, but must consider and separately provide for the distinctions occasioned by the varying nature and character of the duties which railroad operatives may be called upon to discharge."

In further analyzing the contention of the plaintiff in error, the language of the court is:—

> "When the proposition is thus accurately fixed it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the Fourteenth Amendment has a scope and effect upon the lawful authority of the States contrary to the doctrine maintained by this court without deviation. . . . To this destructive end it is apparent the argument must come, since it assumes that however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class."

Can it be claimed that the force of this decision extends further than upholding the power of the states to exert their lawful police authority? Does it mean anything more than that this court will not hold the exercise of the governmental power of the state unconstitutional "because as a result of the exercise of the power to classify some inequality may be occasioned"? We do not understand that it in any way contravenes the fundamental principle of our government that equality of rights and

privileges should be the aim of the law. It does not oppose our contention that for the classification of persons or for a preference given to one class over others there must be some reason suggested by necessity, some rational basis, the purpose of which is to afford equal protection to all.

> "The purpose of the law makers was evidently not to make the men because employed by railroad companies favorites of the law, but to afford protection owing to the peculiar hazards of their situation."
>
> *Akeson* v. *R.R.*, 106 Iowa, 54.

Nor does it, we contend, nullify the language of this court as it appears in the opinion of Mr. Justice Brewer in *Gulf, Colorado & Santa Fé Ry.* v. *Ellis*, 165 U. S. 150, and afterwards quoted in *Connelly* v. *Union Sewer Pipe Co.*, 184 U. S. 540:—

> "Yet it is equally true that such classification cannot be made arbitrarily. The State may . . . not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. . . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which

bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Assuming as we do that the equal protection demanded by the Fourteenth Amendment in respect to legislation by the states is similarly demanded by the Fifth Amendment in respect to legislation of Congress,—

French v. *Barbour*, 181 U. S. 324, 328,—

and that no classification can be made that does not rest upon some proper basis, then the hazardous character of the railroad business seems to offer the only reasonable and natural test.

It is still our contention that it is for this court to determine the propriety of the classification sought by this Act.

It is respectfully submitted that a classification is not justified by general considerations when the reason for the classification applies to less than one-fifth of the class selected.

[Accident Insurance Manual, pages 365–371.
Twenty-first Annual Report of the Interstate Commerce Commission, page 153,

wherein it is stated that not over nineteen or twenty per cent. of the total number of railway employees are engaged in any hazardous service at all.]

It is not understood that the decision of *Louisville & Nashville Ry.* v. *Melton*, supra, or the cases therein cited,—

Tullis v. *Lake Erie & W. R.R.*, 175 U. S. 348,
Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 294,
Orient Ins. Co. v. *Daggs*, 172 U. S. 557,
Minnesota Iron Co. v. *Kline*, 199 U. S. 593,
Martin v. *Pittsburg, etc., R.R.*, 203 U. S. 284,
Southwestern Oil Co. v. *Texas*, 217 U. S. 114,—

are inconsistent with the doctrine expressed in the opin-

ion of *Johnson* v. *Ry. Co.*, 43 Minn. 222, where the court said:—

> "One rule of liability cannot be established for railway companies merely as such and another rule for other employers under like circumstances and conditions. . . . It has been sometimes loosely stated that special legislation is not class if all persons brought under its influence are treated alike under the same conditions. But this is only half the truth. Not only must it treat alike under the same conditions all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions."

Under its power to regulate commerce between states, Congress has by the provisions of this Act sought to alter the existing law by enlarging the rights of certain employees and increasing the liabilities of certain employers who are engaged in interstate commerce. Of those engaged in interstate commerce, Congress has selected that class of common carriers whose carriage of person and property is by means of railroad. It has granted rights not existing heretofore to the interstate employees of railroads alone, and has not brought within its influence employees of other interstate carriers who are under the same conditions. To that class would belong the messengers of the express companies, the telegraphers of the telegraph company, those employed upon docks and wharves of carriers by water, and that large body of employees of all interstate carriers whose work is purely clerical.

The Act has not included within its provisions the interstate employees of all other persons engaged in interstate commerce. That class includes those employed in shops of a car-building company, machinists, employees in storage elevators and in warehouses, clerks, and many other employees working under precisely the same conditions.

So, too, the Act includes within its terms only one class

of employers who are engaged in interstate commerce; namely, railroads. Upon what just basis rests the discrimination against railroad companies engaged in interstate commerce who operate and maintain boats, wharves, docks, and incidental equipment, and other employers engaged in interstate commerce operating and maintaining boats, wharves, and incidental equipment under precisely the same conditions?

It would seem, therefore, that the provisions of the Act have not brought within its influence all who are under the same conditions; that it is partial in its operation, and has no reasonable basis for its attempted classification.

VI.

The Provisions of Section 5 violate the Fifth Amendment in that it interferes with Freedom of Contract.

Section 5 of the Act provides that any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void, provided that in any action brought against any such common carrier under or by virtue of any of the provisions of this Act such common carrier may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

It is plain that this section is not a regulation of interstate commerce, and prescribes no rule by which either traffic or transportation may be regulated.

While it is not denied that Congress may prohibit contracts which in their effect amount to regulations of commerce, a pure contract of employment in its effect

has no direct or indirect bearing upon interstate commerce.

The carrier is forbidden to make contracts for relief or for insurance, and it is to be borne in mind that an injured employee is not given by the Act the option as to whether he should proceed under the Act or proceed under a contract of relief or indemnity.

In *Adair* v. *U. S.*, supra, Mr. Justice Harlan said:—

> "The first inquiry is whether the part of the tenth section of the act of 1898 upon which the first count of the indictment was based is repugnant to the Fifth Amendment of the Constitution declaring that no person shall be deprived of liberty of property without due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good."

The right to contract is as well recognized as the right to property.

In *Allgeyer* v. *La.*, 165 U. S. 578, the court said:—

> "The liberty mentioned in that amendment [the 14th] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In *R.R. Co.* v. *Richmond*, 19 Wall. 584, the court said:—

> "The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation; it was never intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse."

A contract for insurance or relief or indemnity is not inconsistent with public interests or hurtful to public order. Its effect is not a regulation of interstate commerce, nor is it remotely connected with traffic or transportation.

Congress in this respect and under the guise of regulating interstate commerce sought to legislate upon the right of contract in relation to matters only indirectly and remotely connected with interstate commerce.

In *Hoxie* v. *N. Y., N. H. & H. R.R. Co.*, 82 Conn. 352, p. 369, the language of Chief Justice Baldwin was as follows:—

> "The provision of Sec. 5, that any contract between an interstate carrier and *any* of its employees in such business, intended to enable it to exempt itself from any liability created by the Act 'shall to that extent be void,' is, in our opinion, in violation of the Fifth Amendment to the Constitution of the United States, as tending to deprive the parties to such a contract of their liberty and property without due process of law. The contract may be one made on a full consideration by an employee, or one seeking to become such, who is fully capable of understanding its meaning and effect. He may be the general manager of a great railroad system, the damages resulting from the loss of whose life might justly be estimated at a vast sum. His salary may have been agreed on in view of this provision of exemption. To avoid that, and yet let the other provisions of the contract stand, would necessarily

work rank injustice. It would virtually deprive the carrier of its property, and—under the construction of that phrase adopted by the courts of the United States—do so without due process of law. *Adair* v. *U. S.*, 208 U. S. 161, 172, 28 Sup. Ct. Rep. 277."

"The statute cannot be regarded in this respect as one made for the protection of an ignorant and improvident class, such as the Acts regarding shipping articles. The employees of a railroad company are, in general, men of more than ordinary intelligence. The dangerous nature of the business requires and secures this. It cannot be regarded as one made for the protection of train-hands, for it covers every kind of employees. It denies them one and all that liberty of contract which the Constitution of the United States secures to every person within their jurisdiction.

The Act, it is to be remembered, does not confine itself to avoiding a contractual provision for exemption from liability for the negligence of the carrier's servants while engaged in carrying on the work of transportation. It avoids a provision for exemption from liability for the negligence of its servants, while not engaged in carrying on the work of transportation, and even while not engaged in the line of their service at all."

VII.

Construction of the Act.

to whom the statute applies.

The consideration of this subject involves the following assignments of error:—

31. The court erred in refusing to give the defendant's request for ruling No. 1,—

"Upon all the evidence the plaintiff cannot recover."

44. The court erred in refusing to give the defendant's request for ruling No. 14,—

> "There is no evidence that would warrant the jury in finding that the plaintiff's intestate was employed by the defendant in interstate commerce at the time of his death."

The employee must be engaged in interstate commerce at the time of his injury in order that he may maintain his action under the statute. The burden is necessarily upon the plaintiff to show that at the time of the injury he was not engaged in intrastate commerce. It is difficult to determine what part of the work of an employee may be devoted to commerce that is described as interstate and not to intrastate commerce. Within the employment of any railroad engaging in interstate commerce there are many classes of employees. There are different grades of work. Of certain employees there is required more skill and experience than of another class of employees. The work performed by some employees may be properly described as dangerous, while the work performed by other employees is subject to no more risks than the ordinary occupations of life. There are employees engaged in the direct movement and operation of trains; employees engaged in the repair and maintenance of tracks; those engaged in the construction and repair of locomotives and cars; those whose duties are purely commercial and clerical. Does the Act apply to all of these employees?

The Supreme Court of Iowa has held that a similar statute of that state was to be construed only in favor of those employees who were exposed to the dangers incident to the operation of trains.

In *Foley* v. *R.R.*, 64 Iowa, 644, it was held that the statute did not apply to a car repairer for injuries received while repairing a car on a side track.

In *Stroble* v. *R.R.*, 70 Iowa, 555, an employee who was injured by a defect in steps attached to a platform for the unloading of coal was not permitted to recover.

In *Malone* v. *R.R.*, 65 Iowa, 417, an employee who was engaged in wiping engines was held not to be a

person engaged in the operation of a railroad within the meaning of the statute.

The Supreme Court of Minnesota has similarly construed the Employers' Liability Act in that state.

Johnson v. *R.R.*, 43 Minn. 222.
Jemming v. *R.R.*, 96 Minn. 302.

In *Missouri, K. & T. R.R.* v. *Medaris*, 60 Kansas, 151, in construing the Employers' Liability Act of Kansas, it was held that the plaintiff who was employed in setting curbing around an office building and depot of the railroad could not recover.

In *Indianapolis & G. R.R.* v. *Foreman*, 162 Ind. 85, the application of the Indiana statute was not extended in favor of the plaintiff, who was an employee of the railroad company, engaged in the construction of a track.

The construction of the Act of 1908 received the attention of the Circuit Court of the United States in *Taylor* v. *Southern Railway*, 178 Fed. Rep. 380 (1910), where the court held that a member of a railroad-bridge gang, injured while engaged and within the scope of his employment in repairing bridges by an alleged defective scaffold, though his duties required the work in the repair of bridges for the railroad company in different states, was not engaged in interstate commerce within the meaning of the Employers' Liability Act of 1908.

The construction of the Safety Appliance Act in certain aspects affords some analogy to a construction of the present Act.

The case of *St. Louis & S. F. R.R.* v. *Delk*, 158 Fed. Rep. 931 (1908), arose out of an action in which the plaintiff Delk sought to recover for injuries in consequence of the negligence of the railroad company in failing to provide for his safety, as required by law. The principal question in the case concerned the construction and application of the Safety Appliance Act. The car alleged to be defective was loaded with lumber con-

signed from Giles, Arkansas, to Memphis in Tennessee. The car arrived in Memphis September 28, 1906, and was delivered by the plaintiff in error to the Union Railway Company of Memphis for delivery to the consignee. The car was returned to the plaintiff in error by the Union Railway Company upon October 3 on account of a defect in the coupling. The car was then placed on what is described as a "dead" track in defendant's yard in a string of nine cars. The car was still loaded, and had not reached the consignee. A card with the words "out of order" written upon it was placed upon the car. Dolk was injured during a switching movement and on account of the defect in the said car. The opinion of Judge Lurton, Circuit Judge, is as follows:—

> "I entirely concur in the conclusion of the court and the interpretation given to the car coupler act, but I cannot agree that this car was so clearly 'in use,' contrary to the provisions of that act, as herein interpreted, so as to take that question from the jury. I think the stoppage of this car on the dead track was not in any true sense an incident of its transportation in interstate traffic. True, its journey was not finished, but its further journey had been stopped because the next carrier refused to receive it with this defective coupler. There was evidence tending to show that it was not a case of a temporary stoppage, such as that in *Johnson* v. *Southern Pacific Company*, 196 U. S. 1, . . . but a withdrawal from all use in any kind of traffic until it could be repaired. It was placed on a track where cars needing only light repairs were ordinarily placed and was tagged as in 'bad order.' There was also evidence tending to show that the effort to couple the car was solely for the purpose of holding the car, against gravity, in its place on this track until it could be repaired. A car withdrawn from its journey and held upon a dead track to be repaired is not in my judgment 'a car in use,' contrary to the provisions of the car coupler act, any more than a car in a shop awaiting repairs. In *Johnson* v. *Sou. Pac. Company*, before cited, the dining car having a defective coupler had not been withdrawn from its journey to be

repaired. Its stoppage was one usual and incident to its journe and that it might be returned over its usual rou in the ordinary course of the kind of interstate commerce it was habitually engaged in. No ques on of withdrawal from traffic for the purpose of re airs was in that case. The point decided is well shown by the Chief Justice where he says:

"Confessedly, this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

The facts are quite like those recently considered by the Court of Civil Appeals of Tennessee, not yet reported, in the case styled "*McLaughlin* v. *Union Ry. Co.*," where that court held that a car withdrawn for repairs was not a car in use contrary to the act, and the movement of such car necessary to getting it into the shops was not a use which brought the car within the car coupler act. See also, *Ry.* v. *Bolles*, 71 Mi. 1003 . . . and *Taylor* v. *Boston Ry.*, 189 Mass. 390, . . being cases under state laws similar in character and presenting in each the question of whether a disabled car being handled as a "bad order" car for purposes incident to repair was a car engaged in service."

The language of the court in the case last cited is of significant application to the facts in the present case. While it is true that car N. Y., N. H. & H. 85070 was picked up outside of Connecticut, and was loaded with perishable freight brought from outside of the state (Record, p. 37), the car had been taken out of the train at Midway. The words "cut out" in chalk had been placed upon the car. It had been removed from the train, and taken down to what was known as track No. 1, the "repair track" (Record, p. 22). Whether or not the contents of the car—namely, the perishable freight—had been removed from it or not does not appear. At the time of the injury to Walsh it was undergoing repairs. It

had been withdrawn from its journey; it was upon a dead track; it had been removed from all use in any kind of traffic until it could be repaired.

Neither Keating nor Walsh were trainmen engaged in the operation of trains between the states. Their duties were performed for trains that were engaged in intrastate commerce, as much as those which were engaged in interstate commerce. Keating himself testified that the train described as the "Boston extra" did not leave the Midway yard. It stopped there. Part of the train remained and part was switched off and goes out on another train (Record, p. 24). Whether the car in question was intended to go out on another train or whether it had reached its destination was a matter of pure conjecture. Indeed, before their work under the particular car in question had been completed, they inspected another train which may have been of the interstate or intrastate character, and it was only after they had gone to the shanty and returned to their original work that Walsh received the injury.

It would seem to be a strained construction of the statute to hold that Walsh and Keating resumed their employment in interstate commerce by returning to the work of repairs upon car 85070, which had been withdrawn from its journey, if, indeed, its journey was not at an end.

The car bore the same relation to interstate commerce that it would have borne had it been in the repair shop awaiting repairs, and under those circumstances the men engaged in repairing the car would not have been engaged in interstate commerce or any other commerce.

VIII.

The Carrier is not Liable for the Negligence of the Intrastate Employee.

The construction of this part of the Act in its application to the facts in the case at bar concerns the following assignments of error:—

> 31. The court erred in refusing to give the defendant's request for ruling No. 1:—
>
> "Upon all the evidence the plaintiff cannot recover."
>
> 45. The court erred in refusing to give the defendant's request for ruling No. 17:—
>
> "There is no sufficient evidence that would warrant the jury in finding that the plaintiff's intestate was injured by reason of any negligence of any employee of the defendant."
>
> 69. The court erred in giving the plaintiff's 6th request as modified. The 6th request was as follows:—
>
> "If the jury find that there was a blue light on the car under which Keating and the plaintiff's intestate were at work, then if any other employee sent, or in the execution of his duties, permitted another car to be moved against the car under which Keating and the plaintiff's intestate were at work, the jury are warranted in finding negligence on the part of the employees of the railroad company."

The court modified the instruction in this respect, and charged the jury as follows:—

> "If you find that there was a blue light on the car under which Walsh and Keating were working, and as reasonably prudent men they relied upon that rule, you are warranted, if they permitted another

> car to be moved against the car under which Keating and the plaintiff's intestate were working, the jury are warranted in finding negligence on the part of the employees of the railroad company. . . . What the plaintiff and the defendant urge in this matter bring you squarely to that question at issue, was the blue light burning on the car, and there is no question but if the blue light was burning and Williams with that light burning, allowed that car to go down on to that car under which the plaintiff's intestate was working, that the defendant was guilty of negligence and that you may properly find that the employees were negligent. . . . If you find that the plaintiff has met the burden of showing the negligence of some employee, and death resulted in whole or in part from such negligence, then you will pass to the narrower consideration of the case."

In no part of his charge did the court instruct the jury that they must find that Williams or some other employee from whose negligence the death of Walsh resulted must have been engaged in interstate commerce (Record, pp. 51–62, inclusive).

The facts show that at the time of Walsh's death the switching gang in the Midway yard were engaged in the work of distributing cars upon different tracks, presumably with the idea of making up trains. The work consisted of a sorting or classifying nature. Certain cars were to be taken from different trains and placed upon certain tracks. The cars that were being moved in this yard were not engaged in interstate commerce. Indeed, their final destination may have been within the State of Connecticut. Hoban and Williams and the rest of the switching gang were exclusively engaged in yard work. They cannot in any sense be described as engaged in interstate commerce. The cars which Williams placed upon track 21 on which Walsh was hurt were placed there for the purpose of classification (Record, p. 44).

It is contended that, if the Act is found to be constitutional, it follows that the employee from whose negligence the action arises must have been engaged at the

time of the negligent act in interstate commerce. In determining the unconstitutionality of the Employers' Liability Act of 1906, the court said,—

> "As the word "any" is unqualified, it follows that the liability to the servant is coextensive with the business done by the employers whom the statute embraces; that is, it is in favor of any of the employés of all carriers who engage in interstate commerce."
>
> Employers' Liability Cases, 207 U. S. 463, at p. 498.

In other words, it operated in favor of intrastate as well as interstate employees.

The present Act has in terms confined the application of the Act to employees while engaged in interstate commerce. The court, having defined those in whose favor the Act may be invoked, proceeds to describe that class of employees from whose negligence the new liability arises.

> "This also is the rule as to the one who otherwise would be a fellow servant, by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from the "negligence of any of its officers, agents or employees.""
>
> Employers' Liability Cases, 207 U. S. 463, at p. 498.

The purpose of the language of the court manifestly is to emphasize the failure on the part of Congress to distinguish in imposing liability as to whether the negligence is that of an employee who is engaged in intrastate or interstate commerce, and the court further said,—

> "The act then being addressed to all common carriers engaged in interstate commerce and imposing a liability upon them in favor of any of their em-

> ployés, without qualification or restriction as to the business in which the carriers or their employés may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce."
>
> 207 U. S. 463, p. 498.

It is apparent that the Act of 1906 gave to the interstate employee a right of action for the negligence of the state employee, and similarly the Act provided a right of action in favor of the state employee arising out of the negligence of the interstate employee.

To treat a cause of action in favor of an interstate employee for an act or omission of a fellow-servant not engaged in interstate commerce amounts to a regulation of the relation between the carrier and its state employee.

The first section of this Act provides for recovery for injury or death "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier." It substantially re-enacts in this particular the words of the previous Employers' Liability Act of 1906, and must be presumed to have been drafted with knowledge of the construction that language had received by this court. Plainly, the employee for whose negligence the carrier is made liable must at the time of the injury have been engaged in interstate commerce.

In the case of *Zikos* v. *Oregon Railroad & Navigation* Co., 179 Fed. Rep. 893 (1910), the court held that a section man working on a track of a railroad over which interstate and intrastate traffic is moved is employed in interstate commerce within the meaning of this Act. The opinion of the court is elaborate:—

> "The position is taken that the act which, according to common knowledge, was passed for the purpose of curing defects of the Act June 11, 1906, . . . has perpetuated infirmities that the Supreme Court in Employers' Liability Cases . . . . regarded as fatal to the validity of the earlier act. The specific objection is that, while liability is carefully limited by the

preceding clauses of section 1 to common carriers while engaged in commerce, between the states, etc., and to injuries to employés while engaged in such commerce, the final clause of that section holds the carrier liable for "injury or death resulting in whole or in part from the negligence of any of the officers, agents or employés of such carrier," etc. Hence the conclusion that the vice pointed out by the Supreme Court in the Act of 1906 has been preserved in the present act by the provision that the carrier is chargeable by an interstate employé with the negligence of one not engaged in interstate commerce, a matter, it is contended, with which the states only are concerned. But the ground upon which the court rested its decision was that interstate and intrastate employés were inseparably embraced within the statute, the latter not being within the purview of congressional legislation. The same point was made in *Watson* v. *St. Louis, L. M. & S. Ry. Co.*, 169 Fed. 943. In passing upon it Judge Trieber in a learned opinion accepted the literal construction of the statute as constituting the legislative intent, but disposed of the argument by holding to the competency of Congress in virtue of the commerce clause of the Constitution. *That it was the purpose to make an interstate carrier liable to an employé engaged in interstate commerce for the negligence of a fellow servant, also engaged in such commerce, is beyond controversy.* It is not necessary, in view of the facts disclosed by the complaint, to go further than to hold that interstate and intrastate service are separable by upholding liability when injury results from the negligence of fellow-servants engaged in interstate commerce and denying it when resulting through the negligence of an intrastate employé to one engaged in interstate commerce; and this if the act could be held subject to the objection urged against it. This would appear at first blush to run counter to the reasoning which resulted in the overthrow of the first attempt to regulate the matter; but the distinction lies in the definite designation as to when the interstate carrier shall be liable, namely, when engaged in interstate commerce, and to whom it shall be liable, that is, to the employé so engaged, a segregation not made in the original act."

Therefore, the presiding judge erred in the case at bar in failing to instruct the jury that they must find that the plaintiff's intestate was injured by reason of the negligence of some employee who was engaged in interstate commerce, and, in the absence of any evidence warranting such finding, the court should have directed a verdict for the defendant.

IX.

Right of Action in Case of the Death of Employee.

Having given a right of action to an employee, the statute proceeds, "or in case of the death of such employee to his or her personal representative for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier," etc.

Congress therefore sought to regulate the relations of the employer to the members of the family of a deceased employee. It is assumed that none of the members of the family are engaged in interstate commerce. Under its power to regulate commerce Congress proceeds to regulate the duties of administrators appointed by the courts of the various states and to determine whether claims of deceased persons shall be distributed to the parents or to the children.

The consideration of this subject involves in the case No. 559, *Mary Agnes Walsh, Administratrix* v. *New York, New Haven & Hartford Railroad Company*, the plaintiff's assignments of error numbered:—

1. The court erred in sustaining the defendant's demurrer to the first count of the plaintiff's declaration.
2. The court erred in sustaining the defendant's

demurrer to the third count of the plaintiff's declaration.

3. The court erred in sustaining the defendant's demurrer to the fourth count of the plaintiff's declaration.

4. The court erred in sustaining the defendant's demurrer to the sixth count of the plaintiff's declaration.

To summarize, in the first, third, fourth, and sixth counts there is alleged the conscious suffering on the part of the plaintiff's intestate. Inasmuch as the right to recover does not arise at common law, but depends upon a Federal statute, the survival of the cause of action cannot be determined by any State statute.

Baltimore & Ohio R.R. v. *Joy*, 173 U. S. 226.

Revised Statutes, Section 955 (U. S. Comp. St. 1901, p. 697), does not provide what causes of action shall survive.

Under the common law there was no survival, so that the demurrers to counts 1 and 4 were properly sustained.

Inasmuch as counts 3 and 6 were improperly joined, there being allegations of liability for conscious suffering and liability for the employee's death, the demurrer was properly sustained to these counts.

It is proper to consider in this connection, reverting to No. 558, *New York, New Haven & Hartford Railroad Company* v. *Mary Agnes Walsh, Administratrix*, the plaintiff's assignment of error No. 41:—

> "The plaintiff cannot recover in this action because Congress cannot create such a right of action in favor of personal representatives of an inhabitant of a state."

The Act, in granting a remedy to the personal representative of a deceased employee for the benefit of cer-

tain persons, accomplishes the purposes of what is commonly termed a compensation measure rather than a regulation of interstate commerce. The recovery on the part of an employee's widow and children relates very remotely and indirectly to the movement of interstate commerce. Such a provision would seem to constitute a burden rather than an aid to commerce.

Without reciting the various arguments set forth in preceding pages, it is perhaps sufficient to quote the language of Mr. Justice Field in *Sherlock et al.* v. *Alling*, 93 U. S. 99, p. 103, in discussing a statute of Indiana, which provided "that when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission." The language of the court was as follows:—

> "That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the State for torts resulting in the death of parties injured. . . . General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce."

Not only does the Act invade the settled limits of the sovereignty of the states,—

Williams v. *Fears*, 179 U. S. 270,—

but it seeks to determine the administration of the es-

tates of deceased persons. Administrators appointed by the courts of the various states have distinct and certain duties. Congress has not the power to create the duties of an administrator. The power of the administrator is limited by the authority granted him by the state which created his office.

Under the law of Connecticut it is provided that, in a recovery for an injury resulting in death, the damages to be distributed after deducting the costs and expenses of the suit shall go half to the husband or widow and half to the lineal descendants of the decedent per stirpes, but, if there be no such descendants, the whole to go to the husband or widow, and, if there be no husband or widow, to the heirs according to the law regulating the distribution of intestate personal estate.

General Statutes of Connecticut, Section 399.

Under this Act of Congress grandchildren would be cut off in favor of the parents of the decedent, and, in the event of there being no surviving husband, widow, child, or parent, it would exclude the next of kin who were not dependent on the decedent.

It is submitted, therefore, that Congress cannot create such a right of action in favor of the personal representatives of the inhabitant of a state, thereby seeking to regulate the measure of damages and determining the beneficiaries.

In this connection the consideration of the court is invited to the plaintiff's assignment of error numbered 40,—

> "The plaintiff cannot recover because there is no sufficient provision whereby the damages may be assessed by the jury."

The statute is in many respects ambiguous, and the intent of Congress does not appear clearly. Is it for the court to read into the statute a rule for the measure

of damages? Is there anything in the Act itself which is compensatory in its nature? Shall the construction of the Act be uniform in all of the states, or shall it be applied in accordance with the similar statutes in the various states? For instance, in the state where the cause of injury arose it is provided that for injuries resulting in death recovery shall be had for "just damages, not exceeding five thousand dollars."

General Statutes of Connecticut, Section 1094.

In actions of a similar nature arising out of injuries resulting in death in Massachusetts, the damages are assessed in accordance with the degree of culpability of the party from whose negligence the right of action arises.

Revised Laws of Massachusetts, Chap. 111, Sect. 267.

If it was designed by Congress to make carriers more careful in the operation of their trains by making them liable in damages for death, the legislation may be said to be of a punitive character. Considering, therefore, the nature and character of this legislation, the measure of damages may well correspond with the degree of negligence found. Such a construction is consistent with Section 3 of the Act, which provides as follows:—

> "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

It is not argued that similar statutes existing in the various states have been construed to mean that it was the intent of the legislatures to compensate the beneficiaries for the pecuniary loss which had been sustained, but it is the contention that a strict construction of this statute, which alters the common law, is required, and that

no sufficient provision has been made for the assessment of damages.

Sewall v. *Jones*, 26 Mass. 412 or 9 Pick (Mass.) 412.
United States v. *Fisher*, 2 Cranch, 358.
Shaw v. *Railroad Co.*, 101 U. S. 557.

X.

Damages.

It is proposed to consider the defendant's assignments of error numbered 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 40, 50, 54, 62, 65, 66, 67, and 68.

Statement of facts bearing upon the question of damages.

Daniel Joseph Walsh at the time of his death was thirty-one years of age, having lived in this country fifteen years. He left as a widow Mary Agnes Walsh. During the four years which he had worked for the railroad, he had never been absent from work. His wife testified that in consequence of an examination by one Dr. Beckwith, since deceased, insurance had been taken out by her husband in the Travelers' Insurance Company, the Prudential Insurance Company, and the Hibernian Insurance Company, and she had collected the insurance from these different companies. The deceased left three children who were dependent upon him for support.

Testimony was offered by the brother of the plaintiff's intestate that the deceased did not use liquor to excess, was not immoral in his habits; that his work was that of a car repairer in the Midway yard; that at the time of his death he was in good health, and had never been sick.

One *Walter Channing Wright*, a consulting actuary, testified that he made computations which life insurance

companies used, and that he made computations for life, accident, and insurance companies, and was familiar with the methods of computing annuities (Record, p. 30).

The witness testified as follows:—

"*Q.* Assuming that you have a man engaged in the occupation of car inspector; assuming that he works nights around cars in a freight yard; assume that he has been examined and passed by some form of insurance company within four years of the date in question; assuming that he is getting $17.70 a week for seven days in the week; assuming that he was a man about five feet, somewhere five feet eight to five feet ten in height, weighing about one hundred and seventy pounds; was not addicted to the excessive use of alcohol, and as far as we know had no other immoral or bad habit, and assuming in addition to the things that we have asked you to that he was thirty-one years of age,—what, in your opinion, would be a fair value for an annuity on that man's life so that it would give to his widow and children the same income that he was earning?

* * * * * * * *

Mr. HALL. I want it to go on the record that I object to that question because it is incompetent, immaterial, and for the same reason already stated that it goes to prove that which I don't believe the statute provides a remedy for, and in the third place that it contains assumptions which are not warranted by the evidence.

* * * * * * * *

Q. In putting the question will you assume he was examined, leave out the word "passed" and that insurance was afterwards given him.

Mr. HALL. And that also the evidence does not warrant. I wish it further noted that the circumstances of the plaintiff's intestate's life have not been pointed out to him, and it does not appear that the annuity is for a man engaged in the duties of car inspector, nor the rate of reduction that goes for that class of employment. That all goes to my objection to the answer.

Q. And are you familiar in a general way with the duties of car inspector? *A.* Only in a general way.

Q. Well, then I ask you to assume that he was engaged in the duties of car inspector where he inspected cars as they were brought into the railroad yard which involved the necessity of getting underneath the car for the purpose of making repairs, to work in and around cars and locomotives, and do such work as he might be called upon to do in connection with the inspection of freight trains or other trains. Now I ask what is the fair value for an annuity for such a man's life so as to give an annuity of the value of $17.70 a week.

Mr. HALL. That I object to for the reason I have already stated.

COURT. Note your exception. It is admitted.

Q. I want to change that, if I may, what is the fair value of an annuity on a man's life, the man being thirty-one years of age and earning $17.70 for seven days?

* * * * * * * * *

COURT. Please state, Mr. Hall, exactly what your objection is.

Mr. HALL. In the first place I think the question is immaterial, incompetent and improper. I think it has no bearing upon showing the probable length of time which Mr. Walsh would have lived under ordinary circumstances. I think that the question goes to show or tends to show an element of damage which I believe under the statute was not intended to be shown. The statute does not provide for the recovery of any damage such as your Honor is permitting to be shown in this case. To get an insurance expert opinion to show the probable length of time the plaintiff's intestate would have lived, or show what an annuity is worth, I think that further facts should be given to the witness in order that he may form an intelligent opinion. Those are all the reasons that now occur to me. There may be others. I think your Honor should insist on this going in in the proper way. I do not believe in this case such a question should be permitted under such circumstances. I want to incorporate

in my objections my objection to all of this testimony at this time.

COURT. Note the exception and he may answer.

A. Between sixteen and seventeen thousand dollars.

Q. What is the average life expectancy, according to the annuity tables of a man at the age of thirty-one years?

Mr. HALL. I object to that for the reasons already stated to the admission of this testimony.

COURT. Note the exception and answer.

A. That will vary according to the different tables of mortality.

Q. Will you tell the jury some of the principal mortality tables now in use in determining the value of an annuity, mentioning the name of the various tables? *A.* The Healthy District, The British Office Life Annuity tables, with offices in England and Wales, those are the English tables, all English tables and there are the French tables and the tables which have no special name prepared by different actuaries in this country.

Q. And the Carlyle and Northampton Tables? *A.* They are not in use in this country at the present time.

Q. Have you at my request figured out the exact value of an annuity reckoning interest at the rate of four per cent. on the life of a man at thirty-one. Have you there the exact value of that annuity under all those tables? *A.* Under five.

Q. Under five tables? *A.* Yes.

Q. And whether in your opinion they are the principal tables now in use? *A.* For insurance purposes the Healthy District is believed to be.

Q. And without bothering to give all five will you state the maximum and minimum of the five tables which you have worked out?

Mr. HALL. Subject to my exception.

COURT. Note the exception and answer.

A. Northampton, $13,929; Healthy District, $19,060.

Q. As long as the maximum is Healthy District, it might be well, subject to the exception of Mr. Hall, to give us all five. Will you give the five in order stating the name of the company and amount of it.

Mr. HALL. Subject to my exception.

COURT. Note the exception and answer.

A. Northampton $13,928; Carlyle $15,827; American $16,222; Fraternal Congress $17,852; Healthy District $19,060.

Q. Have you any tables showing the expectancy of life of a railroad employee? *A.* Not with me.

Q. Is there any such table? *A.* Not for exactly that purpose, not within my knowledge.

Q. I omitted to ask you,—I have asked you the value of annuities under five tables, have you with you the expectancy of life under the five tables as well? *A.* No, sir.

Q. What would be the average expectancy of life under those five tables, if you know?

MR. HALL. I object for the various reasons I have stated in my previous objections to this line of inquiry.

COURT. Note the exception and answer.

A. The average expectancy of life for the age of thirty-one for a male is about thirty-four or thirty-five years.

Upon cross-examination (Record, p. 34) it appeared that the witness in testifying had assumed a rate of interest at four per cent.; that, using a rate of interest at five per cent., the value would be five or ten per cent. less; that he was familiar with the methods of life insurance companies, and knew that a man's occupation as car inspector might have something to do with the giving of life insurance; that there might possibly be an extra charge of from two to three dollars a thousand; that an annuity is not less expensive the more hazardous the life which the applicant leads; that the question of health has nothing to do with the value of an annuity,—all annuities are fixed to include a great variety of occupations, and might possibly include extra hazardous

occupations; that he had not taken into consideration the occupation of a railroad trainman or car inspector as bearing upon the expectancy of life; and that Mr. Walsh's position as car inspector would have no bearing upon the determination of the price of the annuity. It further appeared that he did not know what the average expectancy of life to a railroad trainman was, and he knew of no tables showing it; that he had not looked into the cost of accident insurance for railroad men, and had not gone into the figures on the expectancy of life to a man engaged in a hazardous occupation; had not made any attempt to find out the expectancy of life of a man engaged in such an occupation as that of Mr. Walsh. He could not give the value of an annuity of a man engaged in such an occupation as that of plaintiff's intestate (Record, pp. 34, 35).

The following assignments of error arose out of questions permitted by the presiding judge to be propounded to the plaintiff:—

12. "*Q.* About what was your husband's weight, if you know? *A.* About 170 pounds."

13. "*Q.* During those four years that you knew that he was working for the railroad, how much, if at all, had he been absent, if at all? *A.* He had never been."

14. "*Q.* Mrs. Walsh, when Dr. Beckwith, who is now dead, was examining your husband for insurance, do you know what insurance was afterwards taken out by your husband in consequence of that examination? *A.* Yes."

15. "*Q.* Now, I ask what company it was? *A.* Travelers."

16. "*Q.* Did you afterwards collect insurance from the Travelers' Insurance Company? *A.* Yes, sir."

The following assignments of error arose out of the admission of questions propounded by counsel for the plaintiff to Walter Channing Wright:—

17. "*Q.* What is the fair value of an annuity on a man's life, the man being thirty-one years of age,

and earning $17.70 for seven days? *A.* Between $16,000 and $17,000."

18. "*Q.* If you purchase an annuity from the various companies issuing them, is a difference made in the price of annuity to a man engaged in what is called a hazardous occupation like that of car inspector than to a man engaged in such a business as farming. Is there any difference in the price of an annuity to the two? *A.* I don't know of any such case."

19. "*Q.* What is the average life expectancy, according to the annuity tables, of a man at the age of thirty-one years? *A.* That will differ according to the different tables of mortality."

20. "*Q.* And without bothering to give all five, will you state the maximum and minimum of the five tables which you have worked out? *A.* Northampton $13,929; Healthy District, $19,060."

21. "*Q.* As long as the maximum is Healthy District, it might be well, subject to the exception of Mr. Hall, to give us all five. Will you give five to one, stating the name of the company and the amount of it? *A.* Northampton, $13,928, Carlyle $15,827, American $16,222, Fraternal Congress $17,852, Healthy District $19,060."

22. "*Q.* What would be the average expectancy of life under those five tables, if you know? *A.* The average expectancy of life for the age of thirty-one for a male is about thirty-four or thirty-five years."

23. "*Q.* As the rate of interest decreases, does the price of an annuity increase or decrease? *A.* If a lower rate of interest were assumed it would increase, if a higher rate of interest it would decrease, it works inversely, the lower the rate the higher the price."

The following numbered assignments of error arose out of the admission of the following questions propounded by the plaintiff to the witness Michael J. Walsh:—

24. "*Q.* Was your brother a man who used liquor to excess? *A.* Not to my knowledge."

25. "*Q.* Was your brother immoral in his habits? *A.* Not that I know of."

27. "*Q.* Will you state what your brother's health was, what was the condition of his health at the time he died, if you know? *A.* I suppose that I know. I never knew him to be sick one day in his life."

28. "*Q.* Did he ever have a bad illness? *A.* Not that I know of."

The following numbered assignments of error arose from the failure of the court to instruct the jury in accordance with the following requests:—

50. "The sum of $900 per year does not fairly represent the yearly value of the plaintiff's intestate's life to the plaintiff measured in dollars and cents."

54. "The jury have no right to consider either the value or the price of an annuity which would yield $900 per year in determining the amount of damages to be assessed in this action."

62. "The court erred in his instructions to the jury that the jury might consider the reasonable expectation as to what he would receive as life advanced and what he would be able to earn."

65. "The court erred in instructing the jury in accordance with the plaintiff's 9th request, which was as follows:

"The measure of damages is compensation for the pecuniary loss sustained by the widow and children of the plaintiff's intestate."

66. "The court erred in instructing the jury in accordance with the plaintiff's 10th request, which was as follows:

"In determining the pecuniary loss to the children of the intestate the jury are entitled to consider their loss of care, attention, instruction and training from their father's death."

67. "The court erred in instructing the jury in accordance with the plaintiff's 11th request, which was as follows:

"Life or mortuary tables may be used as an aid in determining the probable duration of human life. They do not furnish an absolute rule of computation. Each case must stand on its own conditions. The jury are to determine whether or not the deceased would live out the

term of his life expectancy, and in determining this they are to consider his character, habits and morals, his state of health, his care of himself and the occupation in which he was engaged."

68. "The court erred in instructing the jury in accordance with the plaintiff's 12th request, which was as follows:

"Annuity tables may be considered by the jury in ascertaining the compensation the plaintiff is entitled to receive for the pecuniary injury done to the widow and children by the death of the intestate; but the jury are also to consider the state of health of the intestate, his age, habits, occupation and the likelihood of his being able to continue to work during the period of the expectancy of life."

These exceptions relate largely to the question of the measure of damages. It is not incumbent on the court that each exception should be considered separately. They resolve themselves into three classes. Assignments of error 12, 13, 24, 25, 27, and 28 relate to the admission of testimony that concerns the physical description of the decedent, his habits as to the use of liquor, and his general health. If the court was correct in instructing the jury that the measure of damages to be applied relates to the pecuniary loss sustained by the widow and children of the plaintiff's intestate, then it may be unnecessary to consider the admissibility of the testimony contained in these exceptions.

Assignments of error numbered 14, 15, and 16 relate to the admission of testimony concerning the insurance upon the life of the plaintiff's intestate. It appeared that Walsh had been examined by one Beckwith, since deceased. The plaintiff was permitted to testify that, in consequence of the examination, insurance was taken out. She further testified that she collected the insurance from the Travelers' Insurance Company. The purpose of these questions was to permit an inference on the part of the jury

that the health of the plaintiff's intestate was good, and that it was sufficient to warrant the medical examiner to recommend insurance to his company. The testimony was plainly hearsay. It was not admissible, and was prejudicial to the defendant's case.

The testimony that was admitted relating to the cost of annuities depends in some degree upon the view that this court takes of the proper rule of damages to be applied in actions arising out of the Employers' Liability Act.

Unless the court decides that the measure of damages is the pecuniary loss sustained by the widow and children, the testimony was wrongfully admitted.

Assuming, however, that such is the view to be adopted by this court, the rights of the defendant were prejudiced by its admission and by the instructions to the jury relating to the testimony. (Referring to assignments of error 17, 18, 19, 20, 21, 22, 23, 50, 54, 62, 65, 66, 67, 68.)

Assuming that the witness Wright, a consulting actuary, was qualified as an authority familiar with well-recognized and standard tables of annuities, it is to be remembered that his testimony which related to expectancy of life and the price of annuities was based upon tables which were compiled many years ago, and have been recognized by the courts as standard tables.

It is conceivable that the value of the decedent's life to his widow and children may be determined, in a measure, by considering the state of his health, his age, his habits, and his occupation, and it is not argued that the jury may not consider his expectancy of life. Testimony, however, concerning the expectancy of life should only be admitted under proper safeguards.

Expectancy tables are entitled to consideration only when the precedent has brought the deceased clearly within the class of selected lives tabulated.

Kerrigan v. *R.R.*, 194 Pa. 98.
McKenna v. *Gas Co.*, 198 Pa. 31.

In the case at bar the witness was permitted to testify that expectancy of life for a man of the age of thirty-one was about thirty-four or thirty-five years, and the jury were instructed by the court that life or mortuary tables might be used as an aid in determining the probable duration of life. It did not appear, however, that the plaintiff's intestate was of the class which had been selected for annuity or mortality tables. Indeed, the witness admitted that he had no knowledge and did not know what the average expectancy of life to a railroad trainman was. He knew of no figures or tables which showed the average expectancy of life of a railroad trainman or a railroad man (Record, p. 34). He had made no attempt to find out the expectancy of life of a man who was engaged in such an occupation as that of Mr. Walsh (Record, p. 35).

Indeed, the testimony was elicited in this manner:—

> "*Q.* What would be the average expectancy of life under those five tables, if you know? [Record, p. 33.] *A.* The average expectancy of life for the age of thirty-one for a male is about thirty-four or thirty-five years."

If the answer was based upon the experience of the witness, it was clearly incompetent. If, however, the answer was based upon certain standard tables, such as the Northampton or Carlyle, it is contended that those tables themselves were the best evidence and not the testimony of the witness as to their contents.

Whelan v. *R.R.*, 38 Fed. Rep. 15.
Sheffler v. *Ry.*, 32 Minn. 518.
Donaldson v. *R.R.*, 18 Iowa, 280.
Banks v. *Braman*, 195 Mass. 97.

The defendant's rights were even more seriously impaired by the admission of testimony showing the cost of

an annuity to be between $13,928 and $19,060. The same objection as to the competency of the admissibility of these figures is again raised. The tables properly authenticated were never offered, nor indeed were they in court. The testimony was hearsay and improperly admitted.

Sheffler v. *Ry.*, supra.
Banks v. *Braman*, supra.

But, independently of the incompetency of the testimony, the defendant was greatly prejudiced by the admission of this testimony, leaving to the jury the inference that the measure of damages was not the pecuniary loss to the widow and children, but what was the cost of an annuity to a man thirty-one years of age, yielding to him $920.40 yearly. The evidence was misleading and furnished an improper basis upon which to award a verdict. The question for the jury to consider was the pecuniary loss that his widow and children had sustained in consequence of the decedent's death. So far as the testimony goes, he never contributed anything to the support of his widow and children. To what extent the widow and children sustained losses is left to conjecture. How much of his earnings went to the support of his family we have no information. The jury were not invited to consider the personal expenses of the decedent nor the hazards which were incident to his work as a car inspector and repairer. Indeed, the witness Wright testified that he had not looked into the cost of accident insurance for railroad men, that he had not made any attempt to find out the expectancy of life, and could not give the value of an annuity of a man engaged in such an occupation as Mr. Walsh; yet the jury had before them six figures ranging from $13,900 to $19,060 as the cost of an annuity which they might consider in forming a just verdict to compensate the widow and children. The presiding justice went as far as stating to the jury that

the life or mortuary tables did not furnish any absolute rule of computation. He instructed the jury as follows:

> "Annuity tables may be considered by the jury in ascertaining the compensation the plaintiff is entitled to receive for the pecuniary injury done to the widow and children by the death of the intestate; but the jury are also to consider the state of health of the intestate, his age, habits, occupation and the likelihood of his being able to continue to work during the period of the expectancy of life."

The defendant called to the court's attention that $900 per year did not fairly represent the yearly value of the plaintiff's intestate's life. The court charged the jury in connection therewith, as follows (Record, p. 61):

> "I cannot say that you have no right to consider it, but you are not bound by the price of an annuity bringing in $900 a year. And still, gentlemen, if you use the actuary's testimony at all, you must use it with great care. You must be guided by your judgment. The defendant urges that there is no fair and just way in which the jury can find from the evidence any large sum as showing the earning capacity during the expectation of life. And under a fair consideration of the evidence the damage should be small. The plaintiff, on the other hand, says, here is a man shown to have earned a certain amount a week—$17.70—that he was a man of good health, a man of good moral character, his habits of life would be unchanged to a great extent, that as a man his prospects of life were that his earning capacity would not be reduced, and even as age advanced would not be so materially reduced but that the value to his widow and children would be something large and substantial.
>
> "*You cannot in any event exceed the amount of the ad damnum* and you are not to be governed by anything but a consideration of the facts if you come to the question of damages."

It is respectfully submitted that this language is far from sufficient in warning the jury of the dangers of the

consideration of the cost of an annuity based upon an earning of $920 per year.

The court should have instructed the jury in accordance with the 26th request of the defendant, to the effect that the sum of $920 per year did not fairly represent the yearly value of the plaintiff's intestate's life to the widow and children measured in dollars and cents.

In *Baltimore & Potomac R.R.* v. *Mackey*, 157 U. S. 72, Mr. Justice Harlan uses this language:—

> "The statute giving the remedy expressly excludes the creditors of the deceased from any interest in the recovery, and declares not only that the judgment shall inure exclusively to the benefit of his family, but that the damages, not exceeding ten thousand dollars, shall be assessed 'with reference to the injury' done 'to the widow and next of kin of such deceased person.' Under such a statute, it is entirely proper that the jury should take into consideration the age of the deceased, his health, strength, capacity to earn money, and family. The injury done to a family consisting of a widow and helpless young children, who depended for support entirely upon the labor of a husband and father whose death was caused by the wrongful act of others, is much greater than would be done to any 'next of kin' able to maintain themselves and who have never depended, and had no right to depend, upon the labor or exertions of the deceased for their maintenance."

In the case of *Vicksburg, etc., R.R.* v. *Putnam*, 118 U. S. 545, the action arose out of an injury to a passenger upon a railroad company to recover for personal injuries impairing his capacity to earn his livelihood. In that case Mr. Justice Gray stated that, in order to assist the jury, standard life and annuity tables were competent evidence, and used the following qualifying language:—

> "But it has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the con-

science of the jury. On the contrary, in the important and much-considered case of *Phillips* v. *London & Southwestern Ry.*, above cited, the judges strongly approved the usual practice of instructing the jury in general terms to award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted, and all the contingencies to which it was liable; and as strongly deprecated undertaking to bind them by precise mathematical rules in deciding a question involving so many contingencies incapable of exact estimate or proof."

Upon page 556:—

"The natural, if not the necessary, effect of these peremptory instructions at the beginning and end of dealing with this matter would be to lead the jury to understand that they must accept the tables as affording the rule for the principal elements of their computation, and to create an impression on their minds, which would not be removed by the incidental observation of the judge, when speaking of the possibility of the plaintiff's getting well—"This is only one mode of arriving at it;" especially, as it was nowhere, throughout the charge, suggested to the jury that they would be at liberty, if they found difficulty in following the mathematical rules prescribed to them, to estimate the loss of income according to their own judgment."

In *Hinsdale, Ex.*, v. *N. Y., N. H. & H. R.R. Co.*, 81 N. Y. App. Div. 617, an action was brought under Section 904 of the code, which provided that the damages awarded to the plaintiff might be such a sum as the jury upon a trial deems to be a fair and just compensation for the pecuniary injuries resulting from the decedent's death to the person or persons for whose benefit the action is brought, and Section 903 of the code provided that the damages recovered should be for the benefit of the decedent's husband or wife or next of kin. In discussing the proper rule of damages, the court said:—

"While the amount of salary or earnings of a decedent and the probable duration of his life are

competent evidence to enable the jury to estimate the probable loss caused to the widow or next of kin of the decedent by his death, it is quite clear that a verdict for the total amount that the decedent would earn during the period that his life should continue would be grossly excessive. The question for the jury to determine was not what sum would be sufficient to procure for the decedent an annuity equal to the amount of his income for the number of years he would probably have lived had his life not been cut short by the accident; not the amount of money that he would probably have earned for the period of his probable duration of life; but the pecuniary loss that his widow and mother had sustained in consequence of his death. The uncertain element that must necessarily enter into any computation of such a pecuniary loss has been recognized by the courts in determining the nature of the evidence that is admissible in actions of this character. . . . The amount that would be required to procure for the deceased a certain annuity for his life, free from all contingencies of the loss of employment or earning power by sickness or other misfortune, has no relation to the benefit that his wife or mother would have received had his life been continued."

It was similarly held in

Mix v. *Hamburg S.S. Co.*, 83 N. Y. S. 322.
Fajardo v. *N. Y. C. & H. R. R.R.*, 82 N. Y. S. 912.

"The jury must determine the amount of the loss, and to do this may apply their own observation, experience and knowledge to the circumstances of the case, but they must confine themselves to the evidence. The expectancy of the life of the deceased may be shown; but to show this the longevity of the father or mother of the deceased cannot be shown. . . . It cannot be shown what would be the cost of an annuity bond on the deceased's expectancy of life which would be sufficient to produce an an-

nual income equal to his income at the time of his death."

Thornton on Federal Employers' Liability and Safety Appliance Acts, p. 121.

Under the circumstances of the admission of the evidence showing the cost of an annuity yielding $900 per year for thirty-five ars, it is fair to assume that the jury accepted that cost as a controlling basis for determining the pecuniary loss to the widow and children. The verdict arrived at may well have been due to the fact that the jury accepted the defendant's contention that death was due in a great measure to the contributing negligence of the decedent.

XI.

Recent Cases arising under the Federal Employers' Liability Act of 1908.

In the cases of

Fulgham v. *Midland Valley R.R.*, 167 Fed. Rep. 660,
Clark v. *So. Pac. R.R.*, 175 Fed. Rep. 122,
Bottoms v. *St. Louis & S. F. R.R.*, 179 Fed. Rep. 318,

it is held that the Act of April 22, 1908, superseded all State statutes regulating the relations of employers and employees engaged in interstate commerce by railroad.

The cases of

Nelson v. *So. Pac. R.R.*, 172 Fed. 478,
Cound v. *Addyston T. & S. Ry.*, 173 Fed. 527,
Smith v. *Detroit & T. S. R.R.*, 175 Fed. 506,
Whitaker v. *Illinois Central R.R.*, 176 Fed. 130,

Hubbard v. *Chicago M. & St. P. R.R.*, 176 Fed. 994,
Johnson v. *Great Northern R.R.*, 178 Fed. 643,
Newell v. *B. & O. R.R.*, 181 Fed. 698,
Miller v. *Illinois Central R.R.*, 168 Fed. 982,

all relate to matters concerning the jurisdiction of the court.

The constitutionality of the Act is sustained in the cases of

Colasurdo v. *Central R.R. of N. J.*, 180 Fed. 832.
Watson v. *St. Louis, I. M. & S. R.R.*, 169 Fed. 942.
Zikos v. *Oregon R.R. & Navigation Co.*, 179 Fed. 893.

The Act was held unconstitutional in the cases of

Hoxie v. *N. Y., N. H. & H. R.R.*, 82 Conn. 352.
Mondou v. *N. Y., N. H. & H. R.R.*, 82 Conn. 373.

In the cases of

Tsmura v. *Great Northern R.R.*, 108 Pac. 774,
Zikos v. *Oregon R.R. & Navigation Co.*, supra,
Colasurdo v. *Central R.R. of N. J.*, supra,
Troxell v. *Delaware, etc., R.R.*, 180 Fed. 871,
Duke v. *St. Louis & S. F. R.R.*, 172 Fed. 684,

the meaning of certain provisions of the Act is construed by the court.

XII.

The court erred in denying the defendant's motion to set aside the order to plead. The writ was served upon the New York, New Haven & Hartford Railroad Company upon July 17, 1909. The language of the writ is as follows:—

Massachusetts } THE PRESIDENT OF THE UNITED
District, ss. } STATES OF AMERICA.
L.S.

To the Marshal of our District of Massachusetts or his Deputy, GREETING:

We command you to attach the goods or estate of the New York, New Haven and Hartford Railroad Company, a corporation organized under the laws of the Commonwealth of Massachusetts, and a citizen thereof, having an usual place of business at Boston in our District of Massachusetts to the value of twenty-five thousand dollars, and summon it, if it may be found in your District, to appear before our judges of our Circuit Court of said United States for the First Circuit, next to be holden at Boston, within and for our said District of Massachusetts, on the third Tuesday of October next, then and there in our said Court to answer unto Mary Agnes Walsh, now residing in New London, in the State of Connecticut, an alien, subject of Edward the Seventh, King of the United Kingdom of Great Britain and Ireland, as she is Administratrix of the Estate of Daniel Joseph Walsh, late of said New London, duly appointed by the Probate Court for the District of New London in said Connecticut and the Probate Court for the County of Suffolk in said Massachusetts, Plaintiff, in an action of tort to the damage of the said plaintiff, as she says, the sum of twenty-five thousand dollars, which shall then and there be made to appear, with other due damages, and have you here this writ with your doings thereon.

WITNESS the Honorable MELVILLE W. FULLER, Chief Justice of the United States, at Boston, the

sixteenth day of July, in the year of our Lord one thousand, nine hundred and nine.

CHARLES K. DARLING,
Clerk.

The plaintiff filed her declaration upon July 19, 1909, and the following order was entered:—

ORDER TO PLEAD.

JULY 19, 1909.

The plaintiff, having filed the pleadings on her behalf pursuant to Rule XII, the defendant, under the provisions of said Rule, is ordered to plead thereto within one calendar month hereafter, subject to the penalty of default.

CHARLES K. DARLING,
Clerk.

By JOHN E. GILMAN, JR.,
Deputy Clerk.

Upon July 21, 1909, an affidavit of service of order to plead was filed. The defendant, the New York, New Haven & Hartford Railroad Company, moved to set aside the order to plead (Record, p. 12) upon August 5, 1909, setting forth that the writ in the action was returnable on October 19, 1909, and that in accordance with the practice of the court the defendant should be allowed thirty days thereafter within which to answer or to demur, and that it was not within the power of the court to command the defendant to so plead before the return day of the writ. This motion was denied on August 5, 1909, the defendant duly excepting, and in compliance with the order to plead appeared upon August 17, 1909, and filed its demurrer and its answer.

Rule XII. of the Circuit Court of the United States for the First Circuit is as follows:—

"Any defendant, after a proceeding at law is commenced, and any plaintiff, after making service

> and causing the cause to be docketed, which for this purpose he may do either in term time or vacation, may enter an order as of course, in any stage of the pleadings, that the other party shall plead within one calendar month thereafter, provided that the plaintiff or the defendant entering the order has, at the time of so entering it, filed the pleadings on his own behalf which are to be answered by the other party; and thereupon the adverse party shall plead within said calendar month, subject to the penalty of non-suit, dismissal or default as the case may be, unless for good cause the court or a judge thereof shall impose other terms."

Our contention is:—

(1) That the court had not the power to command the defendant to plead before the return day of the writ, and

(2) That the order as issued was not in accordance with the provisions of the Statutes of the United States or in accordance with the rules for the First Circuit of the Circuit Court of the United States.

The writ, in the name of the President of the United States, attested by the presiding justice of the Supreme Court and under its seal, signed by the clerk of the court, was the due process whereby the defendant was to be brought within the jurisdiction of the court and called upon to answer to the action. The time when the defendant was to submit to the jurisdiction of the court in answer to the process was fixed as the third Tuesday of October, 1909. This date having been fixed by due process of law, it cannot be changed by an inferior authority or by proceedings less solemn.

The Federal courts derive their power to issue the common law writs from Revised Statutes of the United States, Section 911, empowering them generally to issue writs. The form of the Federal writs is also prescribed by Congress.

> "All writs and processes issuing from the courts of the United States shall be under a seal of the court and signed by the Clerk thereof."

The effect of Rule XII. is to empower the plaintiff to force the appearance of the defendant before the court at a time earlier than that which has been specified in the writ.

By the Revised Statutes of the United States, Section 914, it is provided that—

> "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of Court to the contrary notwithstanding."

By the Revised Statutes of the United States, Section 918, it is provided that—

> "The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Section 918 of the Revised Statutes in the revision was not made to conform with the law embodied in Section 914 of the Revised Statutes. The latter has overruled the provisions of Section 918 so far as the same are inconsistent.

Morrison v. *Bernards*, 35 Fed. Rep. 400.
Indianapolis R.R. v. *Horst*, 93 U. S. 291.
Amy v. *Watertown*, 130 U. S. 301.
Nudd v. *Burrows*, 91 U. S. 426.

It is clear that it is essentially within the practice and pleading of the state to determine the time of pleading.

Ricard v. *Inhabitants of Tp. of New Providence*, 5 Fed. Rep. 433.
Bills v. *St. Louis & Chicago R.R.*, 13 Blatch. 227.
Lewis v. *Gould*, 13 Blatch. 216.

The provisions of Section XII. do not conform "as near as may be" to the statute and rules of practice for the Commonwealth of Massachusetts.

Section 21 of Chapter 167 of the Revised Laws of Massachusetts provides as follows:—

> "An original writ issued by the supreme judicial court or the superior court, if required to be served fourteen days before the return day, shall be returnable at the election of the plaintiff at any return day which occurs after the expiration of fourteen days from, and within three months after, the date of the writ; and, if required to be served thirty days before the return day, shall be returnable at the election of the plaintiff at any return day which occurs after the expiration of thirty days from, and within three months after, the date of the writ."

Section 10 of Chapter 173 of the Revised Laws of Massachusetts provides as follows:—

> "The declaration, unless it has been inserted in the writ, may be filed in the clerk's office or in the office of the justice of a police or district court which has no clerk on or before the return day of the writ, or it may be filed with a trial justice at the time and place at which the writ is returnable. If, in an action in which there has been an attachment of property, the declaration and bill of particulars, when such bill is necessary, have not been inserted in the writ, a copy thereof shall be furnished to the defendant or his attorney within three days after a demand in writing therefor upon the plaintiff or his attorney."

Section 54 of Chapter 173 of the Revised Laws of Massachusetts provides:—

> "If the defendant in an action commenced in the supreme judicial court or the superior court, having been duly served with process, fails to enter an appearance in writing within ten days after the return day of the writ, his default shall be recorded, and after the expiration of four days from such default, the plaintiff may have judgment entered by order of the court or by the clerk as of course without any further order. Upon a default at any stage of the proceedings in an action pending in said courts, the damages shall, upon motion of either party, be assessed by a jury. If the defendant in an action commenced in a police, district or municipal court or before a trial justice, having been duly served with process, fails to appear or answer thereto, his default shall be recorded and judgment shall be rendered for the plaintiff with costs. Courts may, for good cause shown, extend the time for entering an appearance, and may, in their discretion and upon terms, take off a default at any time before judgment."

It is from the preceding provision of the statutes that the court is authorized to default for want of appearance. The courts of Massachusetts would have no power to default the defendant before the return day of the writ. The Federal courts can have no greater power.

The provisions of Rule XII. do not conform to Rule X. of the Superior Court for Massachusetts, which provides as follows:—

> "Demurrers, answers, and, in real and mixed actions, pleas, shall be filed within thirty days from the return day, unless the court shall by special order restrict or extend the time; and, if the answer or plea be not so filed, a default may at any time be entered by order of the court on motion of the plaintiff."

As to practice, a rule of the State court is binding upon the United States Court.

Mutual Building Fund v. *Bossieux*, 1 Hughes, 386.

Section 918 of the Revised Laws of the United States did not give the several circuit and district courts power to change the return day or the time specified in the writ when the defendant was to appear and answer to the action. It permitted the courts to make certain rules and orders directing the returning of writs and processes, the filing of pleadings and the taking of rules, but this is very far from changing the time of appearance of the defendant in the original writ.

In the case at bar, the plaintiff in error, the New York, New Haven & Hartford Railroad Company, was brought into court to answer at a date earlier than that specified in the original writ, and brought in when it did not appear that the defendant in error had caused the cause to be docketed. This is not in accordance with the due process of law as required by the Fifth Amendment to the Constitution.

The order to plead in this case was invalid, and should have been stricken from the record in accordance with the defendant's motion.

XIII.

Waiver of Assignments of Error.

In case No. 558, *New York, New Haven & Hartford Railroad Company, Plaintiff in Error*, v. *Mary Agnes Walsh, Administratrix*, the plaintiff in error waives the following assignments of error: Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 26, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 42, 47, 48, 49, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 64.

JOHN L. HALL,

Of Counsel for New York, New Haven & Hartford Railroad Company.

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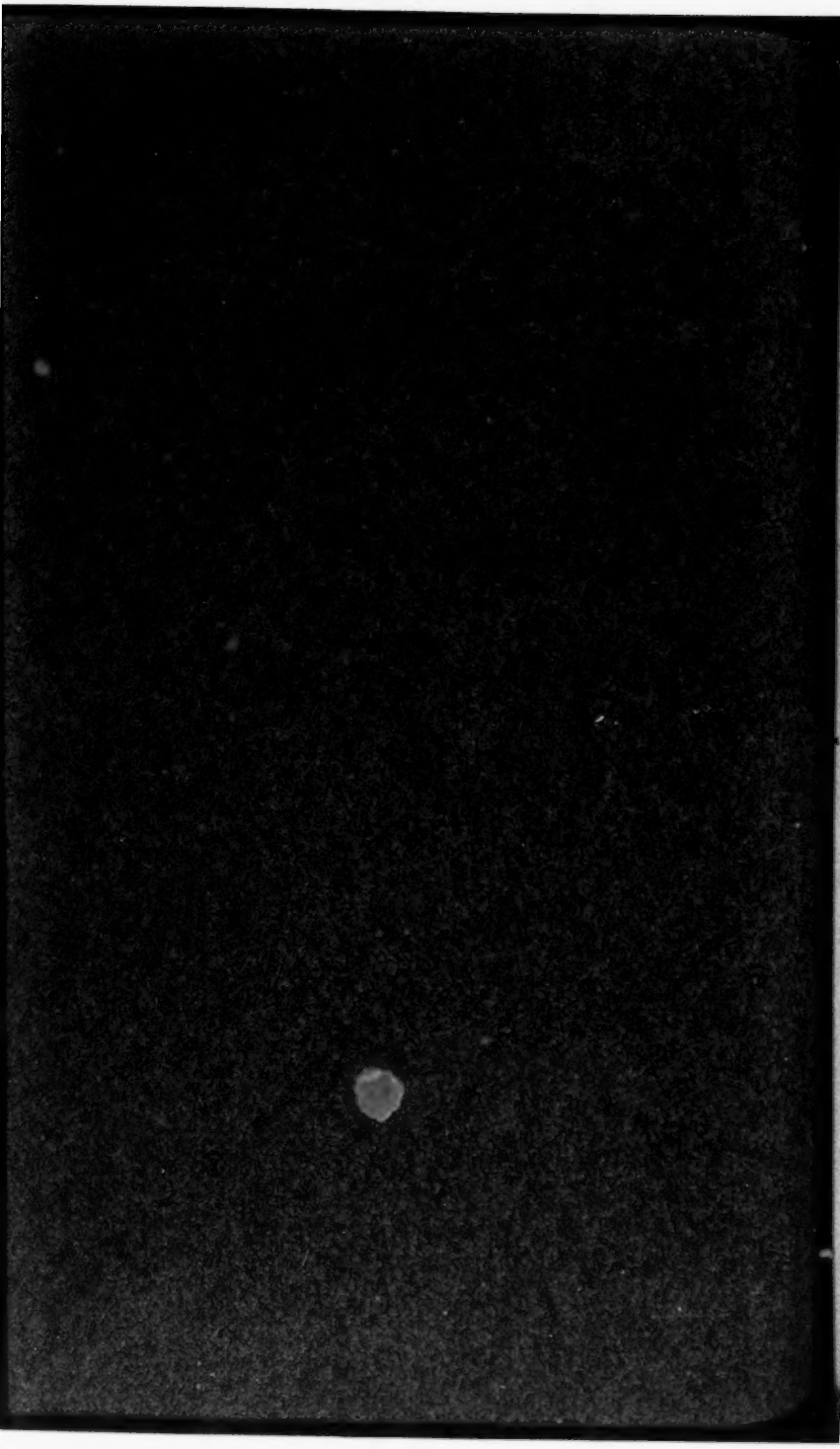
NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE DEFENDANTS IN ERROR IN THE FIRST CASE AND FOR THE PLAINTIFF IN ERROR IN THE SECOND CASE



Supreme Court of the United States

OCTOBER TERM, 1910.

No. 558.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, *Plaintiff in Error,*

v.

MARY AGNES WALSH, Administratrix of the Estate of Daniel Joseph Walsh, deceased.

No. 559.

MARY AGNES WALSH, Administratrix of the Estate of Daniel Joseph Walsh, deceased, *Plaintiff in Error,*

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE DEFENDANT IN ERROR IN THE FIRST CASE AND FOR THE PLAINTIFF IN ERROR IN THE SECOND CASE.

STATEMENT OF FACTS.

These are two writs of error growing out of an action of tort, brought by Mary Agnes Walsh, Administratrix of the Estate of Daniel Joseph Walsh, deceased, against the New York, New Haven & Hartford Railroad Company, in the Circuit Court

of the United States for the District of Massachusetts, by writ dated July 16, 1909. The writ was returnable on the third Tuesday of October, 1909, was duly served on July 17, 1909, and with the declaration was duly entered on July 19, 1909 (Record, pp. 4, 5). On the same day in accordance with Rule 12 of said court the defendant was ordered to plead within one calendar month. Service of this order was duly made, and affidavit of such service duly filed. On August 5, 1909, the defendant entered a special appearance, and moved to set aside the order to plead, which motion was denied, and the defendant duly excepted (Record, pp. 11, 12).

On August 17, 1909, the defendant filed a demurrer and an answer not waiving demurrer (Record, pp. 12, 13).

The declaration was in eight counts. The demurrer was sustained as to the first, third, fourth, and sixth counts, to which ruling the plaintiff duly excepted (Record, p. 19). The demurrer was overruled as to the second and fifth counts, to which ruling the defendant duly excepted (Record, pp. 19, 20). No objection was at that time made to the seventh and eighth counts. The case then went to trial before Hale, J., and a jury (Record, p. 20). On motion of the defendant a verdict for the defendant was directed by the court upon the seventh and eighth counts, to which ruling the plaintiff duly excepted (Record, pp. 16, 17, 116). The plaintiff waived the fifth count, and the case went to the jury upon the second count only (Record, p. 62).

There was evidence tending to show the following facts:—

The intestate of the plaintiff in the court below, hereafter called "Walsh," was on February 11, 1909, employed by the defendant in the court below, hereafter called the "Company," as inspector in its Midway Yard, so called, near New London in the State of Connecticut. It was Walsh's duty to inspect, and, if found defective, to repair, cars of the Company arriving at said yard. The plaintiff in the court below, hereinafter called the "Administratrix," introduced evidence tending to show that on that day, at about 3.10 A.M., Walsh and one Keating, in pursuance of their regular duties, inspected a certain train, called the "Boston Extra," which had just arrived. A certain car in this train, numbered either 85070 or 85075, was found by them to have a defective "draft spring," and thereupon, in accordance with instructions and in the usual course of their duties, Walsh and Keating caused the defective car to be "cut out" of the train, and placed upon a certain track in the yard which was used, but not exclusively for that purpose, to receive cars needing repairs (Record, pp. 22, 24, 41). It is admitted that the defective car, whichever number it was, contained perishable freight, brought in it from outside the State of Connecticut (Record, pp. 37, 42, 47). The car being loaded with perishable freight, it was the duty of Walsh and Keating to repair it at once (Record, p. 23), and they pro-

ceeded to do so. It being night, they placed a blue light on the end of the car toward the open track, where it could be seen by any employee of the Company about to back down other cars upon the same track, and proceeded to make the necessary repairs. They worked for *about a half-hour*, took out the broken spring and put a new one in its place, *and had nearly finished the work*, when they left it to inspect another train which had just come in. After such inspection, which lasted about a half-hour, they returned to work on the car in question, noticing, as they did so, that the blue light was in the same place and still burning (Record, p. 23). After they had been at work for a few minutes, a car was "kicked" down upon the defective car without any notice or warning, and Walsh, who was then at work underneath the defective car, was killed (Record, pp. 20–27). There was a rule of the Company as follows:—

> Rule 26. A blue flag by day and a blue light by night, displayed at one or both ends of an engine, car or train, indicates that workmen are under or about it. When thus protected it must not be coupled to or moved. Workmen will display the blue signals and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track so as to obstruct the view of the blue signals without first notifying the workmen (Record, p. 26).

There was no other rule touching this matter, and no instructions had been given to Walsh or to Keat-

ing to give any other or further notice or warning that workmen were under or about the car (Record, p. 37). The car that was "kicked" down upon the defective car was one of several which were being shunted on to various tracks by the switching crew in said yard, all of whom were employees of the Company (Record, p. 24 *et seq.*). There was evidence tending to show that at the time of the accident this car was coupled to "an Erie flat car" (Record, p. 41), and was part of a train which had come from "down east" (Record, p. 43).

The Company introduced evidence tending to show that at, and just previous to, the time of the accident no light was displayed on the car which was being repaired (Record, pp. 39–45).

Walsh left a widow, the administratrix, and three children, four years, two years, and one year old, respectively, dependent upon him for support. The administratrix was duly appointed as such both in Connecticut and in Massachusetts (Record, p. 29).

The case was submitted to the jury under instructions found on page 51 of the Record.

The jury returned a verdict for the Administratrix (Record, p. 17).

Each party sued out a writ of error. The assignment of errors by the Company (Case No. 558) is found on page 120 of the Record, that by the Administratrix (Case No. 559) on page 119.

The principal questions in the case are raised by the former, and these will be taken up first:—

ARGUMENT.

The Company does not now contend that the trial court did not have jurisdiction of the case; and the assignments of error based on that contention will therefore not be considered.

The only assignments of error now relied upon by the Company are those relating to

1. The constitutionality of the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act.

2. The order of the Circuit Court requiring the Company to plead within one calendar month.

3. The question whether the Company and Walsh were engaged in interstate commerce at the time of the accident.

4. The rule as to the measure of damages, and the method of computing damages, as laid down by the Circuit Court.

5. Certain specific rulings and refusals to rule of the presiding judge in the Circuit Court.

These will be taken up in the order named:—

I.

Constitutionality of the Act of April 22, 1908.

The assignments of error relating to this question are those numbered 2, 39, 40, 41, and 42.

Record, pp. 120 and 125.

Before dealing with these specifically, we beg leave to refer to certain general considerations:—

In view of the recent thorough discussion of this matter in the cases involving the constitutionality of the Act of Congress of June 11, 1906 (The Employers' Liability Cases, 207 U. S. 463) we do not feel called upon to set forth at great length arguments with which the court must be familiar, but shall content ourselves with summarizing briefly the principal points upon which we rely.

The Employers' Liability Act of 1906 was declared unconstitutional because it was addressed to all common carriers engaged in interstate commerce, and imposed a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees might be engaged at the time of the injury, and it was held that the Act therefore included subjects outside the power of Congress to regulate under the Commerce clause.

Employers' Liability Cases, *supra*, at p. 498.

Immediately after the Act of 1906 was declared unconstitutional, Congress, upon the recommendation of the President, enacted the Act of April 22, 1908. It had before it the decision just referred to, and it attempted in the new Act to meet, and, we submit, did meet, the objections to the former act.

See Report of House Committee on the Judiciary on House Bill 20310, printed in Thornton: The Employers' Liability, etc., Acts, pp. 247–260.

The new act, in Section 1, expressly limits the liability of the employer to cases where the employee suffers injury *while he is employed by an interstate railroad in interstate commerce.*

The objection to the former act that to limit its scope, by interpretation, to interstate commerce, so as to validate it in the States, would unduly restrict its scope in the Territories, etc., the provisions as to the States and as to the Territories, etc., being in the same section, is met by placing the provisions as to the Territories, etc., in a separate section (Section 2).

The constitutionality of the Act of 1908 has been upheld in an elaborate opinion by Judge Treiber in

> *Watson* v. *St. Louis, I. M. & S. Ry. Co.*, 169 Fed. 942 (Circuit Court E. D. Arkansas, E. D. June, 1909),

and was also upheld in

> *Colasurdo* v. *Central R.R. of N. J.*, 180 Fed. 832 (Circuit Court S. Dist. of N. Y. July, 1910)

and in

> *Zikos* v. *Oregon R. & N. Co.*, 179 Fed. 893 (Circuit Court E. D. Wash. E. D. June, 1910),

and was assumed or upheld by implication in

> *Fulgham* v. *Midland Valley R. Co.*, 167 Fed. 660 (Circuit Court W. D. Arkansas, Ft. Smith Div., February 19, 1909).

Winfree v. *Northern Pac. Ry. Co.*, 173 Fed. 65 (Circuit Court of Appeals, 9th Circuit, October 4, 1909).

Dewberry v. *Southern Ry. Co.*, 175 Fed. 307 (Circuit Court N. D. Georgia, January 8, 1910).

Bottoms v. *St. Louis & S. F. R. Co.*, 179 Fed. 318 (Circuit Court N. D. Georgia, May 3, 1910).

So far as we know, the Act of 1908 has been held unconstitutional only in the cases of *Hoxie* v. *N. Y., N. H. & H. R.R. Co.*, 82 Conn. 354, and *Mondou* v. *Same*, 82 Conn. 373, both decided by the Supreme Court of Errors of Connecticut. The Hoxie case is considered, and a contrary conclusion reached, by the court in *Zikos* v. *Oregon R. & N. Co.* (ubi supra).

It is not necessary to cite authority for the proposition that the statute, being the act of a co-ordinate branch of the government, will be upheld, unless it clearly violates the supreme law of the land; but we beg to refer to the forcible language of Mr. Justice Moody on this point in the Employers' Liability Cases at page 509 *et seq.*

We proceed now to take up in order the reasons set forth by the Company for its contention that the Act of 1908 is unconstitutional.

Assignment of error No. 2, that the court erred in overruling the demurrer of the Company to the second count of the declaration, merely summarizes the more specific objections set forth in the other

assignments relating to this question, and is believed to be covered by what follows:—

1. *Has Congress power to regulate the relations of master and servant as between an interstate carrier and an interstate employee?*

This question is raised by assignments of error No. 39 (*a*), (*b*), (*c*), and (*d*), which may be considered together.

It is submitted that this question has already been decided by this court.

In the Employers' Liability Cases, *ubi supra*, six of the nine justices held that Congress has the power in question. In delivering the majority opinion, Mr. Justice White, after stating that the court was not at liberty to avoid deciding this question, since to do so might mislead Congress, proceeded to uphold the power of Congress to regulate the relation between master and servant when both are engaged in interstate commerce.

> Employers' Liability Cases, *ubi supra*, at p. 494 *et seq.*

He says at page 495: —

> We think the unsoundness of the contention, that because the act regulates the relation of master and servant, it is unconstitutional, because under no circumstances and to no extent can the regulation of such subject be within the grant of authority to regulate commerce, is demonstrable. We say this because we fail to perceive any just reason

> for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce or within the authority given to use all means appropriate to the exercise of the powers conferred.

Speaking of this opinion, Judge Treiber in the Watson case says that it cannot be regarded as *obiter* merely. It is a

> "carefully prepared opinion on an important question of law expressly decided by the trial Court, properly brought before the Court by the assignment of errors and the pleadings in the case, and which was fully and ably argued by counsel for all the parties."

Judge Treiber goes on to say:—

> This is peculiarly applicable to cases in which grave constitutional questions only are involved. Congress having evidenced by the enactment of the statute that, in its opinion, legislation on that subject should be enacted, when the constitutionality of such an act is questioned upon a number of grounds, among which is one attacking the power of Congress to legislate upon that subject, courts, as a rule, decide that question, even if the act must be held to be unconstitutional upon other grounds. If the power exists, Congress had indicated its desire to exercise it. The Supreme Court evidently presumed that, if the act is invalid for some reason other than

> a want of power to enact it, it would be re-enacted, omitting or changing those provisions which make it unconstitutional. That is what Congress did in this instance.
>
> See also *State* v. *Chicago, M. & St. Paul R. Co.*, 136 Wis. 407, at 410.

With the opinion of Mr. Justice White on this point Mr. Justice Day concurred, as did also the four dissenting justices. Mr. Justice Moody said (p. 519),—

> I agree entirely with all that was said in the opinion of Mr. Justice White in support of the power of the Congress to enact a law of this general character.

In the case of *Adair* v. *U. S.*, 208 U. S. 161, decided shortly after the Employers' Liability Cases, the power of Congress in question was reaffirmed (p. 177 *et seq.*). And see also dissenting opinion of Mr. Justice McKenna at page 183.

In view of the foregoing it seems to us entirely unnecessary to consider this question further here. To do so would be merely to restate what has been stated by the court, after full discussion, in the Employers' Liability Cases and in the Adair case.

2. *Has Congress power, in regulating the relations of master and servant, as aforesaid, to make an interstate carrier liable to an interstate employee for the negligence of an intrastate employee?*

This question is raised by assignment of error No. 39 (*e*).

It is submitted that Congress has such power.

a. The fellow-servant rule is an exception to the general rule, *respondeat superior*. If Congress repeals the fellow-servant rule as to employees of an interstate carrier while engaged in interstate commerce, then the employer becomes directly responsible in such cases to the injured employee by force of the general rule; and it is entirely immaterial how the employee who caused the injury was employed, since his act or omission is legally that of the employer.

> See *Watson* v. *St. Louis, etc., Ry. Co.*, ubi supra, at p. 950 *et seq.*

In other words, if there is a direct liability of the employer to the employee, it makes no difference whether the cause of the injury is animate or inanimate, whether it is a defective machine or a negligent employee; or whether, if the latter, the employee is interstate or intrastate. The cause of the injury is immaterial, provided it is, by the rule, *respondeat superior*, the act or omission of the employer himself. If it is, then the only persons to be considered, so far as this question is concerned, are, on the one side, the employer who is held to have caused the injury, and, on the other, the employee who is injured. It is the relation between these two which is regulated by the act; and both of them must, by the terms of the Act, be engaged, at the time of the injury, in interstate commerce. The Act, therefore, in no way interferes with intrastate affairs.

b. Assuming, however, that the Act must be held to regulate intrastate commerce, to some extent, because it makes the employer liable for the negligence of intrastate employees, nevertheless, even in that event, the Act is not invalid, because, wherever it is a necessary incident to the regulation of interstate commerce, Congress may control to that extent intrastate commerce.

In

U. S. v. *Col. & N. W. R.R. Co.*, 157 Fed. 321, Sanborn, J., says at page 330:—

> The constitution reserved to the nation the unlimited power to regulate interstate and foreign commerce, and if that power cannot be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce so far as necessary, in order to regulate interstate commerce fully and effectually.

That case came up under the Safety Appliance Act; but it is submitted that the general principle is sound and is applicable to the present case.

See also

The Daniel Ball, 10 Wall. 557, 566.
In re Debs, 158 U. S. 564, at 599.
U. S. v. *Burlington, etc., Ferry Co.*, 21 Fed. 331, 340.
The Hazel Kirke, 25 Fed. 601, 607.

If the present Act regulates intrastate commerce to the extent that it makes the employer liable for the

negligent acts of intrastate employees, such regulation is incidental to the regulation of interstate commerce. Since the statute only applies where the injured employee is engaged in interstate commerce, it follows that the negligent act of the intrastate employee must take effect at a point where interstate commerce is being carried on. We submit that the intrastate employee becomes, by reason of his negligent act, so closely related to interstate commerce that he falls under the power of Congress above described to "regulate intrastate commerce so far as necessary in order to regulate interstate commerce fully and effectually." To hold otherwise would be to deny the power of Congress to protect the interstate employee in a large number of cases, and therefore to limit its power over interstate commerce, or to prevent it to that extent from exercising such power "fully and effectually."

See opinion of Judge Treiber in the Watson case, ubi supra, at p. 953.

Colasurdo v. *Central R.R. of N.J.*, ubi supra.

Thornton: The Employers' Liability, etc., Acts, pp. 48, 49, 50.

c. This point does not seem to have been argued by counsel or discussed by the court in the Employers' Liability Cases. Except for the words of Mr. Justice White on page 498, beginning, "This also is the rule as to the one," etc., the court seems to confine itself throughout to the consideration of the relation to interstate commerce of the *injured*

employee, without regard to the relation to such commerce of the *negligent* employee. In view of the evident intention of the court, not only to pass upon the precise question before it, but also to indicate, to some extent at least, the powers of Congress in relation to the subject, it would seem that, if the objection now under discussion had been thought to be a serious one, it would have been more fully discussed by the court.

In *Adair* v. *U. S.*, ubi supra, at page 178 the court, speaking of the decision in the Employers' Liability Cases, says:—

> In that case [the Employers' Liability Cases] the court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employés in such interstate commerce, in cases of personal injuries received by employés while engaged in such commerce.

There is nothing here to indicate that any distinction is made between injuries due to the negligence of *interstate* employees and injuries due to the negligence of *intrastate* employees.

See also

> *El Paso, etc., Ry. Co.* v. *Gutierrez*, 215 U. S. 87, at p. 93.

d. If the court should hold that the Act is constitutional, but applies only where the negligent fellow-servant is engaged in interstate commerce, then we are entitled to prevail in this case, because

there was evidence that the negligence which caused the accident was that of interstate employees. That negligence was the negligence of the switching crew, or of the conductor of that crew, in backing down a certain car upon the car under which Walsh was working. The car which was backed down was a New York, New Haven & Hartford box car, which was coupled to an Erie flat car, and was part of a "down east" train. There was therefore evidence that the crew was engaged in sorting or separating cars used in interstate commerce, and were, therefore, themselves engaged in interstate commerce at the time of the injury (Record, pp. 41, 42, 43).

The provisions of the Act in this respect are separable, and liability may be upheld where the injury is caused by an interstate employee, although denied where caused by an intrastate employee.

Zikos v. *Oregon R. & N. Co.*, ubi supra.

3. *Does the Act violate the Fifth and the Fourteenth Amendments, or either of them?*

This question is raised by assignments of error No. 39 (*f*), (*g*), (*h*), (*i*), and (*j*).

The contention is, we presume, that the Act is unconstitutional as "class legislation," because it is limited to "common carriers by railroad," and because it embraces all interstate employees of an interstate railroad without reference to the degree of danger which surrounds their employment.

a. It is well settled that railroads may be classed

as subjects for special legislation on account of the dangerous character of their business. In the Employers' Liability Cases the court says at page 503:—

> We deem it unnecessary to pass upon the merits of the contentions concerning the alleged repugnancy of the Statute, if regarded as otherwise valid, to the due process clause of the Fifth Amendment to the Constitution, because the act classifies together all common carriers. Although we deem it unnecessary to consider that subject, it must not be implied that we question the correctness of previous decisions noted in the margin, wherein state statutes were held not to be repugnant to the Fourteenth Amendment, although they classified steam railroads in one class for the purpose of applying a rule of master and servant.

The cases referred to are:—

> *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205.
>
> *Minneapolis, etc., Ry. Co.* v. *Herrick*, 127 U. S. 210.
>
> *Chicago, etc., R.R.* v. *Pontius*, 157 U. S. 209.

This point is discussed by Mr. Justice Moody in his dissenting opinion in the Employers' Liability Cases at pages 536–539. He concludes with these words:—

> Whether the law should be made to apply to all carriers or to carriers by railroad alone, or whether the employees should be classified according to the degree of danger which

surrounds their employment, is a matter of legislative discretion with which we have no right to meddle. See *Union Pacific Ry. Co.* v. *Mackey*, ubi supra.

In *Louisville & Nashville R.R. Co.* v. *Melton*, 218 U. S. 36, it was contended that the Employer's Liability Act of Indiana, of March 4, 1893, is unconstitutional because it violates the "equal protection clause" of the Fourteenth Amendment. The Indiana Act provides that every railroad operating in that State shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence,—first, when such injury is suffered by reason of any defect in the condition of ways, works, plants, tools, and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation or some person entrusted by it with the duty of keeping such ways, works, plant, tools, or machinery in proper condition; second, where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform and did conform.

This Court says at page 53:—

"It is beyond doubt foreclosed that the Indiana statute does not offend against the equal protection clause of the Fourteenth Amendment, because it subjects railroad employés to

> a different rule as to the doctrine of fellow-servant from that which prevails as to other employments in that State,"

citing

> *Tullis* v. *Lake Erie & W. R.R. Co.*, 175 U. S. 348.
>
> *Pittsburg, etc., Ry. Co.* v. *Ross*, 212 U. S. 560.

If the Indiana Act does not violate the Fourteenth Amendment, *a fortiori*, the Act under discussion does not violate the Fifth Amendment, which does not contain the "equal protection clause."

See *Watson* v. *St. Louis, etc., Ry. Co.*, ubi supra, at page 946.

b. It is also contended that the Act is invalid because "not limited in its operation to such claims of employees as might rightfully be embraced within its terms." We presume that this means that the inclusion, for purposes of the Act, of all interstate employees of interstate railroads in one class renders the Act unconstitutional.

We submit that one simple answer to this contention is as follows:—

At common law all fellow-servants were put in one class for the purpose of determining the liability of the master to one of such servants for the negligence of another. The common law fellow-servant rule was the result of the opinions of judges as to what was demanded by "policy and general convenience." *Farwell* v. *Boston & Worcester R.R.*, 4 Met. 49. There is nothing in the Constitution

to prevent Congress, within the limits of its jurisdiction, from changing this common law rule, as it has been changed by statute in many of the states, whenever, in the exercise of its legislative discretion, it considers that "policy and general convenience" demand such change. The classification is made by the common law, and the common law is repealed by Congress. At common law there was no distinction made, in applying the fellow-servant rule, between greater and less dangerous employment; and in repealing that rule there is no constitutional reason why Congress must make such distinction.

But, whether the foregoing be a valid argument or not, the question here raised has been definitely settled by the case of *Louisville & Nashville R.R. Co.* v. *Melton*, ubi supra. In that case it was expressly decided that the Indiana Act above referred to does not violate the provisions of the Fourteenth Amendment, although it puts in one class *all* employees of railroads, without regard to whether their employment renders them subject to the hazards peculiar to the operation of railroads or not.

See also *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114.

And here again, if there is nothing in the Fourteenth Amendment to prevent a State from passing an Employer's Liability Act which puts in one class all railroad employees, irrespective of the hazardous nature of their employment, as in the Indiana Act, *a fortiori* there is nothing in the Fifth Amendment

to prevent Congress from making a similar classification in a Federal Employer's Liability Act.

4. *Has Congress power to provide a remedy to an injured employee of an interstate carrier as provided in section 3 of the Act?*

This question is raised by assignment of error No. 39 (*k*).

Section 3 takes away the defence of contributory negligence as a bar to recovery, but allows such negligence to be shown in reduction of damages.

This is, in effect, applying to railroads within the scope of the Act a rule analogous to the Admiralty rule.

The Admiralty rule has been held to promote "the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good."

> *The Max Morris*, 137 U. S. 1, 14.
> See remarks of Mr. Justice Moody in Employers' Liability Cases at p. 539.

The analogous defence of the assumption of risk is abolished or modified in certain cases by Section 8 of the Act of March 2, 1893, known as the Safety Appliance Act; and this Act was upheld in

> *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1.
> *Schlemmer* v. *Buffalo, etc., Ry. Co.*, 205 U. S. 1.

The common law rule that contributory negli-

gence is a bar to recovery may be altered or abolished by the legislature whenever, in its discretion, it sees fit to do so.

> "A person has no property, no vested interest in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other."
>
> *Munn* v. *Illinois*, 94 U. S. 113, 134,

cited with approval in

> *Hurtado* v. *People of California*, 110 U. S. 516.
>
> See also *Wilmington Mining Co.* v. *Fulton*, 205 U. S. 60, at p. 74.
>
> *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 524.

A legislature may by statute extend the common law liability of a railroad,

> *Chicago, etc., Ry. Co.* v. *Zernecke*, 183 U. S. 582,
>
> *St. Louis, etc., Ry. Co.* v. *Taylor*, 210 U. S. 281,

or limit it,

> *Martin* v. *Pittsburg, etc., R.R.*, 203 U. S. 284.

If Congress has the power to regulate the relation between interstate railroads and their employees while engaged in interstate commerce, and may prescribe a rule of liability as between them (*Adair* v. *U. S.*, ubi supra, at p. 165), it certainly has the power to determine the extent of that liability, and

therefore to alter or abolish the common law rule that contributory negligence is a defence.

5. *Is the Act invalid because it violates the Constitution and statutes of Connecticut, and because it has been held unconstitutional in that State?*

This question is raised by assignments of error No. 39 (1), (*m*) (*n*), and No. 42.

If Congress has power under the Constitution of the United States to pass the Act, it is clear that nothing in the Constitution, laws, or decisions of the courts of Connecticut can in any way affect its validity, so that these assignments raise no new question.

> Constitution of the U. S., Art. VI., par. 2.
> *Nashville, etc., Ry. Co.* v. *Alabama*, 128 U. S. 96, at p. 99.

6. *Assignment of error No.* 40 *is that "the plaintiff cannot recover because there is no sufficient provision whereby the damages may be assessed by the jury."*

But it is not necessary that an Act of this nature should make any provision for the assessment of damages. If it makes none, the jury will be instructed as to the manner of assessing damages, and these instructions will be based upon the principles of the common law governing actions of tort for personal injury.

The Act under discussion does to some extent make provision for the assessment of damages, for it pro-

vides that where there is contributory negligence the damages shall be "diminished by the jury in proportion to the amount of negligence attributable to" the injured employee. The damages which are to be "diminished" are, of course, the damages assessed according to the rules of the common law governing actions of tort for personal injuries.

A very large percentage of all statutes extending a common law liability or imposing a new liability make no provision in regard to the method of assessing damages, that matter being left entirely to the courts.

The Safety Appliance Act is a penal statute, and there are no words specifically giving an injured employee a right of action for damages, much less providing how those damages shall be assessed; but, since a violation of a statutory obligation is negligence, an employee who is injured by reason of such violation has his action for damages, and those damages will be assessed according to the principles applied in similar actions of tort for personal injuries.

Johnson v. *Southern Pac. Co.*, ubi supra.
Schlemmer v. *Buffalo, etc., Ry. Co.*, ubi supra.

7. *Can Congress create such a right of action in favor of personal representatives of an inhabitant of a state?*

This question is raised by assignment of error No. 41.

The same question was raised in the case of *Hoxie* v. *N. Y., N. H. & H. R.R. Co.*, ubi supra. Chief Justice Baldwin says at page 372:—

> If the damages recoverable are to be treated as representing estate left by the decedent, it is for the state of his domicile to regulate their distribution. If they are to be treated as a fund created by this act, which does not represent anything that ever belonged to the decedent, it was, in our opinion, not within the competency of Congress thus to bring into existence a new duty of executors or administrators to collect, and a new duty of master to pay, what the decedent never owned. Such legislation falls solely within the sphere of the States.

It is submitted that this raises no new question. The argument rests on the proposition that the Act is outside the power of Congress under the commerce clause. It does not deny that the States may pass laws providing for recovery in case of death, nor that they may provide as to whom damages recovered shall be paid. The proposition simply is that Congress cannot legislate as to these matters.

The answer to this question has been already given. If Congress has the power to regulate the relation of master and servant, as between an interstate railroad and its employees engaged in interstate commerce, and may establish a rule as to the liability of the former to the latter, then the power to provide how that rule shall be enforced, and in

favor of whom, is incidental to the general power, and must necessarily be implied in it. It would be strange if Congress could legislate as to the liability, but not as to the method of enforcing it; could say that the master should be liable, but not to whom, or for whose benefit. As we have already seen, there is no doubt that Congress may, within constitutional limits, alter or modify the common law. A State statute as to distribution of estates can stand on no higher ground.

See *Sherlock* v. *Alling, Admr.*, 93 U. S. 99, at p. 104.

Whether, therefore, the damages recovered be considered a part of the decedent's estate or as a "fund created by this Act," the disposition of them is within the control of Congress, provided Congress is acting within its powers in establishing the rule of liability in question. That it is so acting, we have already argued. The reasoning in the Hoxie case on this point is considered in *Zikos* v. *Oregon R. & N. Co.*, ubi supra.

We have now, we believe, considered all the specific assignments of error, which are based on the allegation that the Act is unconstitutional.

Two further objections to the Act have been raised in other cases, and, in the event that they should be made here, we proceed to deal with them briefly.

8. *Has Congress power to abolish the doctrine of "assumption of risk" as provided in Section 4 of the Act?*

Substantially the same provision appears in Section 8 of the Safety Appliance Act. That Act was upheld in

Johnson v. *Southern Pac. Co.*, ubi supra.
Schlemmer v. *Buffalo, etc., R. Co.*, ubi supra.

We submit that this question has been settled.

9. *Has Congress power to declare void a contract which enables a common carrier to exempt itself from liability under the Act, as provided in Section* 5?

Without conceding that this section is in any way objectionable, we are content to rest in the position taken by Mr. Justice Moody in the Employers' Liability Cases at page 540. He says in regard to a similar section in the Act of 1906:—

> Without intimating any opinion on that subject, it is enough to say that that part of the Statute is separable from and independent of the remainder, and may stand or fall by itself, and that no question concerning it is raised in these cases.

See *Zikos* v. *Oregon R. & N. Co.*, ubi supra.

In the case at bar no question concerning this section is raised.

It is respectfully submitted that the Act in question is constitutional.

II.

The Order of the Circuit Court requiring the Company to plead within one Calendar Month.

This question is raised by the first assignment of error, which is as follows: "The Court erred in denying the defendant's motion to set aside the order to plead."

The facts material to this question have already been stated. For convenience they may be summarized here as follows:—

The writ, having been duly served upon the Company, was, with the declaration, entered in court on July 19, 1909, and an order to plead under Rule 12 was taken out. This order was duly served and affidavit of service duly made. On August 5, 1909, the Company appeared specially, and made a motion to set aside the order to plead, which was denied. The Company thereafter, on August 17, 1909, filed a demurrer to each count of the declaration and also an answer without waiving demurrer.

Rule 12 is as follows:—

ORDERS TO PLEAD

> Any defendant, after a proceeding at law is commenced, and any plaintiff, after making service and causing the cause to be docketed, which for this purpose he may do either in term time or vacation, may enter an order as of course, in any stage of the pleadings, that the other party shall plead within one calendar month thereafter, pro-

> vided that the plaintiff or defendant entering the order has, at the time of so entering it, filed the pleadings on his own behalf which are to be answered by the other party; and thereupon the adverse party shall plead within said calendar month, subject to the penalty of non-suit, dismissal or default as the case may be, unless for good cause the court or a judge thereof shall impose other terms.

1. It is to be noted at the outset that it does not appear that the Company has suffered any damage by reason of the enforcement of the rule in question. It does not appear that, because of such order to plead, the Company was prevented from taking advantage of any point in its favor or from setting up any defence which it wished to set up. On the contrary, it appears that, after the motion to set aside the order to plead was denied, the Company filed its demurrer, and, after that had been overruled as to certain counts, the case went to trial, and was decided on the merits. There is absolutely nothing in the record to show that the Company has suffered any damage whatsoever in this regard, and for this reason alone we submit that there was no error.

2. It may be argued that the order to plead is inconsistent with the writ, because the latter commands the defendant named therein to appear on the third Tuesday of October, 1909, whereas the order in question requires the defendant to plead to the declaration within one calendar month thereafter; that is, within one calendar month from July 19, 1909.

The plain answer to such contention is that the order to plead supersedes the command contained in the writ. The writ is an order of the court commanding the defendant to appear and answer on a certain day. The order to plead at an earlier day is a subsequent order of the same court, which, if it is inconsistent with the first order, supersedes and controls the first order. The court acquired jurisdiction over the defendant Company when the writ was served.

3. It may be argued that the practice of the Circuit Court in this regard must conform to the State practice, and that the State practice of Massachusetts does not allow the taking out of such an order or require the defendant to plead before the return day named in the writ.

It is true that under the State practice such orders are not issued as of course; but the practice of the Circuit Court need not conform absolutely, but only "as near as may be," to the State practice.

U. S. Rev. Stat., sec. 914.

It is well settled that the words in Section 914, "as near as may be," are to be construed liberally.

In *Indianapolis, etc., Ry.* v. *Horst*, 93 U. S. 291, the court points out that the words "as near as may be" are not "as near as possible" or "as near as may be practicable," and holds that the United States courts may "reject any subordinate provisions in the State legislation, which in their judgment would encumber the administration of the law," and that "while the

act of Congress is to a large extent mandatory it is also to some extent only directory and advisory."

In *Phelps* v. *Oakes*, 117 U. S. 236, and in *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, the language in *Indianapolis, etc., Ry.* v. *Horst*, above cited, was approved.

In *Shepard* v. *Adams*, 168 U. S. 618, it was held that Section 914 is not a peremptory rule, and that a strict and literal conformity is not required;

> "that while it was the purpose of Congress to bring about a general uniformity in Federal and State proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by State legislation, yet that it was also the intention to reach such uniformity often largely through the discretion of the Federal courts exercised in the form of general rules, adopted from time to time and so regulating their own practice as may be necessary or convenient for the advancement of justice *and the prevention of delays in proceedings.*" [Italics our own.]

This case decided that, if the Federal practice and the State practice are at one time substantially similar, and the State practice is then changed, the Federal practice need not be changed to follow it.

In *B. & M. R.R.* v. *Gokey*, 210 U. S. 155, the decision in *Shepard* v. *Adams* was approved and followed.

The many cases on this subject in the Circuit and District courts are collected in Gould & Tucker's

Notes on Revised Statutes of the U. S., at page 285; in Vol. 2 of the same at page 106; and in Vol. 3 of the same at page 95.

The effect of Rule 12 is that a plaintiff may enter his writ at any time, after proper service has been made, and that the defendant must answer to the declaration within one calendar month thereafter, provided service of the order to plead has been made upon him. We submit that the practice under this rule is sufficiently like the State practice to satisfy Section 914 of the Rev. Stat. of the U. S., as construed by the foregoing cases.

By the Massachusetts State practice, in force at the date of the writ in this case and long prior thereto, a writ issued by the Supreme Judicial Court or the Superior Court may be made returnable on the first Monday of any month which occurs after the expiration of fourteen days from, and within three months after, the date of the writ.

> Mass. Rev. Laws (1902), chap. 167, secs. 21, 24.

By the rules and practice of these courts writs are entered on the return day, and may not be entered thereafter without leave of court, but, if such leave is obtained, may be entered at any time before the next regular return day.

> *Dudley* v. *Keith*, 153 Mass. 104.
>
> Supreme Judicial Court Rules for the Regulation of Practice at Common Law, Rule 1.

The defendant must demur, answer, or, in real and mixed actions, plead within thirty days from the return day unless the court shall by special order restrict or extend the time.

Supreme Judicial Court Rules, Rule 6.
Superior Court, Common Law Rules, Rule 10.

It thus appears that the Massachusetts State practice in regard to the entry of writs is very similar to the practice under Rule 12. It is true that under the State practice there is but one day each month on which writs may be entered, unless by leave of court, whereas under Rule 12 writs may be entered on any day; but this is to the advantage of the suitor in the Federal Court, and the prevention of delay in proceedings is one of the objects mentioned in *Shepard* v. *Adams*, ubi supra, to be gained by allowing the Federal courts to exercise their discretion "in the form of general rules, adopted from time to time."

The writ and declaration once entered, the time for answer under Rule 12 is substantially the same as under the State practice.

But there is another aspect of this matter. Under the decision in *Shepard* v. *Adams*, ubi supra, if the Federal practice and the State practice were at one time substantially similar, and if thereafter the State practice was changed, the Federal court was not bound to change its own practice, in order to follow the change in the State practice. This prin-

ciple applies in the present case. Prior to 1885 the practice of the Circuit Court in regard to return days and the entry of writs was substantially the same as that of the State courts. In both cases writs were made returnable on the first day of the next term, after the expiration of sufficient time for service. The number of terms was regulated by statute. In the State there were never more than four terms, and in most of the counties a fewer number. In the Circuit Court there were, and still are, two terms.

Mass. Pub. Stat. (1882), chap. 150, sec. 32.
chap. 152, sec. 17.
chap. 161, sec. 23.

Dudley v. *Keith*, ubi supra, at p. 107.

Act of Congress of March 26, 1812, chap. 45, sec. 1; 2 Stat. L., 696.

Act of Congress of May 14, 1902, chap. 790; 32 Stat. L., 199.

In the State courts writs were entered on the first day of the term, or later by leave of court; and in the Federal court on the first day of the term or the day following, or later by agreement of the parties or order of the court.

Rules of the Circuit Courts of the U. S. for the First Dist., Rule 7.

In both State and Federal courts the defendant was obliged to demur or answer to the merits within thirty days after the return day.

The practice was thus, to all intents and purposes, the same in both jurisdictions prior to 1885.

In 1885 the State practice was changed. Terms of court were abolished, and writs were made returnable on the first Monday of any month, as above set forth.

Acts and Resolves of Mass., 1885, chap. 384.

Rule 12 appears to have been adopted by the Circuit Court in the year 1894. It may have been adopted with the intention of adapting the Federal practice to the changed State practice, as nearly as the court thought possible or advisable. But, however that may be, the important point is that under the decision in *Shepard* v. *Adams*, ubi supra, the Circuit Court was not bound to make any change whatever in its practice in consequence of the change in the State practice, and, if it did make any change, was entitled to make such change as, in its discretion, it thought best.

We respectfully submit:—

a. The Federal practice in the matter in question follows the State practice "as near as may be," as those words have been judicially construed.

b. The State practice and the Federal practice, having been substantially similar prior to the Massachusetts Statute of 1885, the Circuit Court was not bound to follow the practice as changed by that statute, but was entitled to continue its own practice without change, or, in its discretion, to adopt Rule 12 or any similar rule which it might consider

"necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

We respectfully submit that, in denying the motion to plead, the trial court committed no error.

III.

Were the Company and Walsh engaged in Interstate Commerce at the Time of the Accident?

These questions are raised by assignments of error Nos. 43 and 44, which are as follows:—

> 43. "There is no evidence that would warrant the jury in finding that the defendant was engaged in interstate commerce at the time the plaintiff's intestate was injured."
>
> 44. "There is no evidence that would warrant the jury in finding that the plaintiff's intestate was employed by the defendant in interstate commerce at the time of his death."

1. There was ample evidence that the Company was engaged in interstate commerce at the time of the accident.

The accident took place in Connecticut.

> Record, pp. 22, 23.

The train of which the defective car was a part was called the "Boston Extra."

> Record, p. 21.

This car was "picked up outside of Connecticut and was taken out at Midway for repairs," and "was

loaded with perishable freight brought from outside the State of Connecticut."

Record, p. 37, near the bottom.
Record, p. 47, near the top.

It had not reached its destination, but was temporarily stopped in transit, "cut out" of the train for the purpose of repairing a defective "draft spring."

Record, p. 22.

"They do not cut cars out for anything except to repair them."

Record, pp. 24, 25.

The Company is incorporated both in the State of Massachusetts and the State of Connecticut, and does business in both.

Record, pp. 27, 37, 63, *et seq.*

The Boston division of the Company extended from Boston to Readville, the Midland division from Readville to New London, and "both divisions were operated by Mr. Byrnes, Vice-President." The

> "car records showing where the cars were picked up were in the possession of Mr. Arthur F. Currier, who had his office at New Haven."
>
> Record, p. 27.

The car under which Walsh was working when he was killed belonged to the Company.

Record, pp. 22, 37, 43.

The car which was backed or "kicked" down upon the car under which Walsh was working was a car belonging to the Company, coupled to an Erie flat car.

Record, pp. 41, 43.

We submit that, under the decisions, the single fact that the defective car which Walsh undertook to repair contained perishable freight brought from outside the State where the accident happened is sufficient to show that the Company was engaged in interstate commerce at the time Walsh was killed.

The Daniel Ball, ubi supra.
Wabash, etc., Ry. Co. v. *Ill.*, 118 U. S. 557.
Norfolk, etc., Ry. Co. v. *Penn.*, 136 U. S. 114.
U. S. v. *Col. & Northwestern Ry. Co.*, ubi supra.

In the case of *The Daniel Ball* the steamer of that name was engaged in transporting goods wholly within the State of Michigan, destined for other States, and goods brought from other States, destined for places in the State of Michigan. The court said at page 565:—

> So far as she [the steamer] was employed in transporting goods destined for other States or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation

> of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress.

It is true that that case related to transportation on navigable waters,

> "but the power to regulate interstate commerce is as complete upon the land as upon the navigable waters of the nation and congressional regulation upon the former must be interpreted by the same rules and enforced with the same efficiency as like regulations upon the latter."
>
> Sanborn, J., in *U. S.* v. *Col., etc., R. Co.*, ubi supra, citing *In re Debs*, ubi supra.

In *U. S.* v. *Col., etc., R. Co.* the defendant operated a railroad entirely within the State of Colorado and transported thereon

> "articles of commerce shipped in continuous passages from places without the State to stations on its road, or from stations on its road to points without the State free from any common control, management or arrange-

> ment with another carrier for a continuous carriage or shipment thereof."

The case came up under the Safety Appliance Acts. Judge Sanborn says at page 323:—

> Importation into one state from another is the indispensable element, the test, of interstate commerce. Every part of every transportation of articles of commerce in a continuous passage from an inception in one state to a prescribed destination in another is a transaction of interstate commerce. Goods so carried never cease to be articles of interstate commerce from the time they are started upon their passage in one state until their delivery at their destination in the other is completed, and they there mingle with and become a part of the great mass of property within the latter state. Their transportation never ceases to be a transaction of interstate commerce from its inception in one state until the delivery of the goods at their prescribed destinations in the other, and every one who participates in it, who carries the goods through any part of their continuous passage, unavoidably engages in interstate commerce [citing *Rhodes* v. *Iowa*, 170 U. S. 412, 418, 419, 426; *Kelley* v. *Rhoads*, 188 U. S. 1; *Houston Direct Nav. Co.* v. *Ins. Co. of North America*, 89 Tex. 1; *Leisy* v. *Hardin*, 135 U. S. 100; *Lyng* v. *Michigan*, 135 U. S. 161; *Caldwell* v. *North Carolina*, 187 U. S. 622, 631, 632].

As there was evidence in the present case that the Company was operating in more than one State

and that the defective car itself came from outside the State where the accident happened, the cases just cited go farther than it is necessary to go in the present case.

2. There was evidence that Walsh was employed by the Company in interstate commerce at the time of his death.

(*a*) In the first place, it is clear that the defective car which Walsh was repairing at the time he was killed was, under the decisions above and hereafter cited, being used in interstate commerce. It was filled with perishable freight brought from outside the State, and temporarily "cut out" of the train for necessary, but easily and quickly made, repairs.

In *Johnson* v. *Southern Pacific Co.*, ubi supra, a dining car regularly used to furnish meals to passengers between San Francisco and Ogden was, on the day of the accident, dropped off the east-bound train at Promontory, to be picked up by the next west-bound train. When coupling it to an engine in order to turn it around, Johnson was injured. The court says at page 21:—

> The presumption is that it [the dining car] was stocked for the return and as it was not a new car, or a car just from the repair shop, on its way to its field of labor, it was not "an empty" as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employés is practically the same, and we agree with the observation of District Judge Shiras in *Voelker* v. *Ry. Co.*, 116 Fed.

Rep. 867, that "it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the Company, because the cars were loaded, but would not be binding upon the return trip, because the cars were empty."

Counsel urges that the character of the dining car at the time and place of the injury was local only and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use, and *Coe* v. *Errol*, 116 U. S. 517, is cited as supporting that contention. In *Coe* v. *Errol*, it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former state before transportation was begun.

The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable.

Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law.

In *Chicago, etc., Ry. Co.* v. *Voelker* (C. C. A. for the 8th Circuit, 1904), 129 Fed. 522, a car, loaded

with coal and brought by the Railroad over its line from a station in Illinois to its yards in Iowa, arrived one afternoon, and the next morning, when the accident occurred, was on a freight track principally or largely used in receiving incoming freight trains and making up outgoing freight trains. A switching crew, of which Voelker was a member, was engaged in shifting about and coupling this coal car and several other loaded cars. Voelker was killed by being caught while coupling the coal car to another car. The case came up under the Safety Appliance Acts. The court says at page 528:—

> Whether the violation was of the congressional act or of the state statute depended upon whether defendant was a common carrier engaged in interstate commerce by railroad, and was using the car in question on its line of railroad in moving interstate traffic. We think there was evidence that the carriage or movement of the coal with which the car in question was loaded had not terminated, and that the coal was still actually in transit. The evidence contains no suggestion that the car had reached the end of its journey, or that it was to remain indefinitely or for any considerable time on the track where it was at the time of the injury, or that the coal was to be unloaded there. The inference to be reasonably drawn from the evidence is that the car was then about to actually continue the journey toward the ultimate destination of the coal which it was carrying. Whether that was near by or

> remote is not material, because the shipment had originated in another state, and was already impressed with the character of interstate traffic, which would follow it at least until the actual transit ceased. Defendant was clearly shown to be a common carrier engaged in interstate commerce by railroad, and to be using the car mentioned on its line of railroad in moving interstate traffic, and therefore the branch of the case relating to the condition of the coupler is controlled by the act of Congress, and not by the State statute.

In *St. Louis, etc., R. Co.* v. *Delk*, 158 Fed. 931, a case also under the Safety Appliance Act, a car loaded with lumber brought from outside the state was delivered by the Railroad to a "Belt Line" on October 2 for delivery to the consignee. The next day, and before such delivery, it was returned by the "Belt Line" because of a defective coupler, and became one of a string of nine cars on a side track known as a "dead track." On the following day, October 4, Delk, an employee of the Railroad, acting under its instructions, undertook to get certain empty cars out of the string of nine cars, and in so doing attempted to couple the car in question to another car, and was injured. The trial court instructed the jury that the Safety Appliance Act applied to the car in question.

Judge Severens, delivering the opinion of the Circuit Court of Appeals, held that the stoppage in the yard was an incident to the transportation; that the

injury to the coupler was one easily repaired without the necessity of the car being taken to a repair shop; and that the car had not been withdrawn and laid up for repairs, but at the time of the accident was employed in interstate commerce.

With this view Judge Richards concurred.

Judge Lurton said that he could not agree that this car was so clearly "in use," contrary to the provisions of the Act, *as to take the question from the jury*, and said that he thought the stoppage of the car on the dead track was not a case of temporary stoppage, as in *Johnson* v. *Southern Pacific Co.*, but a withdrawal from all use in any kind of traffic, until it could be repaired.

It is to be noted that the exact question before the Court of Appeals on this point was whether the trial court was right in instructing the jury that the car was in use in interstate commerce or whether the question should have been submitted to the jury.

In the case at bar the questions whether the defendant was a common carrier engaged in interstate commerce and whether Walsh received his injury while employed in such commerce were submitted to the jury (Record, p. 53).

The evidence in the case at bar was stronger than it was in the Delk case that the stoppage of the car was a mere incident of the transportation, and that the car had not been withdrawn for repairs, but was still employed in interstate commerce.

The evidence in the case at bar showed that the

car arrived at about 3.10 A.M. (Record, p. 24); that, being filled with perishable freight, it was to be repaired "at once" (Record, p. 23); that the work of replacing the broken draft spring by a new one was "hardly finished" (which words appear from the context to mean "nearly finished") when Walsh and Keating left the work to inspect another train (Record, pp. 23, 25); that they had then been at work on the defective car about a half-hour (Record, p. 25); that, after spending about a half-hour in inspecting the other train, they returned to work on the car in question, and had been working on it for from three to five minutes when the accident happened (Record, p. 23); that it was then about 4 A.M. (Record, p. 43); that it was a frequent occurrence to repair "cut outs" on track 21 at night (Record, p. 37); and that track 21 was not used exclusively for repair purposes (Record, p. 41).

The evidence in the Delk case showed that the defective car, which was loaded with lumber, was laid by for a full day at least before repairs were even begun. Apparently, there was no necessity for haste in making repairs; and no haste was made.

See also

U. S. v. *Chicago, etc., Ry. Co.*, 149 Fed. 486, 490.

U. S. v. *St. Louis, etc., R. Co.*, 154 Fed. 516.

U. S. v. *Ill. Cent. R.R.*, 156 Fed. 182, 193.

U. S. v. *Wheeling, etc., R.R. Co.*, 167 Fed. 198.

Wabash R. Co. v. *U. S.*, 168 Fed. 1.

Belt Ry. Co. v. *U. S.*, 168 Fed. 542.
Chicago Junc. Ry. Co. v. *King*, 169 Fed. 372.
U. S. v. *Southern Ry. Co.*, 170 Fed. 1014.
Johnson v. *Great Northern Ry. Co.*, 178 Fed. 643, 646.
Felt v. *Denver, etc., R. Co.*, 110 Pac. Rep. 215.

We submit that the car on which Walsh was working was clearly in use in interstate commerce at the time of the accident.

(*b*) If, as we believe we have shown, the car was, at the time of the accident, being used in interstate commerce, then we submit that it follows that Walsh was at that time employed in such commerce.

Walsh was working upon an instrumentality of such commerce,—to wit, a car containing freight shipped from another State and "impressed with the character of interstate traffic, which would follow it at least until the actual transit ceased" (*Chicago, etc., Ry. Co.* v. *Voelker*, supra). He was repairing a car "still actually in transit," and the repairs were being made, so that the car might safely resume its journey at the earliest possible moment and that it might not be necessary to unload it and withdraw it from use.

Suppose that the defect in the car had been more serious, in the sense that a longer time was required to repair it, and that it was therefore necessary, in order to save the perishable freight, to unload the car and transfer the freight to another car. There

can be no doubt that an employee of the railroad, assisting in such unloading and transfer, would be engaged in interstate commerce. Under the decisions in the cases of *The Daniel Ball* and of *U. S.* v. *Col., etc., Ry. Co.*, supra, it is clear that the car and its contents, having come from outside the State, any agency acting in its transportation would be engaged in interstate commerce, and, since such agency could only act by and through its employees, that the employee of any such agency would be, while engaged in handling the car or its contents, engaged in interstate commerce. But, if an employee, assisting in unloading the car and transferring its contents to another car, would be engaged in interstate commerce, can it be said that an employee by whose services the car was repaired, so that it was unnecessary to unload it at all, would be any the less engaged in interstate commerce?

There is naturally as yet but little authority upon this point. The question has, however, been considered in the following cases:—

In the case of *Colasurdo* v. *Central R.R. of N. J.*, ubi supra, the plaintiff was injured while working upon a switch in the defendant's yard at Jersey City by being run over by cars "kicked back" along a track connected with the switch, under circumstances which, the jury had found, showed negligence. The track was used both for interstate and intrastate commerce. The court (Hand, J.) held that the plaintiff was engaged in interstate commerce and entitled to the rights secured by the Act

of April 22, 1908. It was argued that because the track was used both for interstate and intrastate commerce the plaintiff was not employed in interstate commerce. The court says:—

> The remaining question is of the application of the Act of 1908 and that turns on whether the plaintiff was employed in interstate commerce. The act in question was passed after the decision of the Supreme Court in the Employer's Liability Cases, 207 U. S. 463, in which a similar Act was declared unconstitutional by a divided Court, because it applied generally to all carriers engaged in interstate commerce, regardless of whether or not the particular act was in interstate commerce. Some questions, however, were decided by the whole court in those cases, and one of these was that the Act was not unconstitutional because it regulated the relation of master and servant; all the justices recognizing that Congress might regulate those relations while the master and servant were employed in interstate commerce. The present Act was clearly passed to meet the objection of that decision, and I think it should therefore be construed as intending to include within the terms "person employed in such commerce" all those persons who could be so included within the constitutional power of Congress; that is to say, the Act meant to include everybody whom Congress could include. Under this construction the inquiry becomes whether Congress could constitutionally have passed a statute regulat-

ing the relation between a carrier-master and a servant who was engaged in the repair of a track used both for interstate and intrastate commerce. Preliminarily the distinction should be noted that the Act will not necessarily apply to the same person in all details of his employment. One man might have duties including both interstate and intrastate commerce, and he would be subject to the Act while engaged in one and not the other. This being so, the question is whether his repairing of a switch is such employment, when the switch is used indifferently in both kinds of commerce. Suppose the track had crossed a corner of a state and there was only one station within that state so that all trains crossing over that track must necessarily be engaged in interstate commerce. Would not a track worker engaged in the repair of such a track be engaged in interstate commerce? I do not think that he would be any the less so engaged than the engineer on the locomotive or the train despatcher who kept the trains at proper intervals for safety. Of course it is not necessary that the man must personally cross a state line. If the repair of such a track be interstate commerce, does it cease to be such because there are two stations within the State and some of the trains start at one and stop at the other? I cannot think that this is true, although counsel have referred me to no case upon the subject and I have found none. The track is none the less used for interstate commerce, because it is also

used for intrastate commerce, and the person who repairs it is, I think, employed in each kind of commerce at the same time. Despite the earlier ruling in *Gibbons* v. *Ogden*, it has in recent times been stated several times by the Supreme Court that state statutes may indirectly regulate interstate commerce even though Congress may at any time itself under its proper constitutional powers enact a provision of directly opposite tenor. *Sherlock* v. *Alling*, 93 U. S. 99, *Reid* v. *Colorado*, 187 U. S. 137. If, as was held in those cases, a state has the power to regulate such commerce until Congress intervenes,—because it is as well within the State's proper powers,—must not the corollary be true as well that Congress may intervene, even when the effect of that intervention be incidentally the regulation of intrastate commerce as well? Could not Congress, for example, provide that all tracks used in interstate commerce must be of a standard width and weight? Would that not affect all tracks used in such commerce although they likewise were used for intrastate commerce? Of course, anyone could use any other tracks he chose for intrastate commerce, but it can surely not be a ground to limit Congress's proper powers that the track has a joint use. If so, the repair of such tracks must be a part of interstate commerce, and under the Employer's Liability Cases, *supra*, the relations of master and servant arising between the railroad and its employees engaged in repairing the track are similarly within the power of Congress.

> I am therefore of opinion that the plaintiff was at the time engaged in interstate commerce and entitled to the rights secured by this Act. That being so, it is a matter of no consequence whether the train that struck him was engaged in that commerce or not. It is true that the Act is applicable to carriers only "while engaged" in interstate commerce, but that includes their activity when they are engaging in such commerce by their own employees. In short, if the employee was engaged in such commerce so was the road, for the road was the master and the servant's act its act. The Statute does not say that the injury must arise from an act itself done in interstate commerce, nor can I see any reason for such an implied construction.

In *Johnson* v. *Great Northern Ry. Co.*, 178 Fed. 643, (Circuit Court of Appeals, 8th Circuit, March 14, 1910), the plaintiff was at work coupling up the air hose on certain cars upon switching tracks in the defendant's yard. In doing this, he was caught between two cars while trying to remedy a defective coupler, which prevented him from coupling the air hose, the cars between which he was working having been brought together by reason of other cars being "kicked" back against them. The car having the defective coupler had been brought from outside the State by the Soo Railroad, delivered to the defendant loaded with coal, and by the defendant delivered to the consignee. It had been unloaded, and at the time of the accident was standing upon a switch track, waiting to be redelivered

to the Soo Railroad. It was afterwards redelivered to the latter road, loaded by it, and returned into the State whence it came. The trial court directed a verdict for the defendant. The Court of Appeals granted a new trial, holding that the car was in use in interstate commerce at the time of the accident, under the decisions in *Johnson* v. *Southern Pacific Co.*, ubi supra, *Voelker* v. *Chicago, etc., Ry. Co.*, ubi supra, and other cases, and that the Safety Appliance Act was applicable. The court then goes on to say that the facts bring the case within the provisions of the Act of April 22, 1908:—

> "As the defendant in moving the car in question was engaged in interstate commerce, plaintiff was employed by such carrier in said commerce, and the approximate cause of the injury was the defective condition of the coupling pin. . . . It is argued that the Employers' Liability Act can have no application to the case as plaintiff was not an employee engaged in interstate commerce. A part of his employment was to see to the coupling of the cars and the air hose upon the cars which were placed upon the transfer tracks. Some of those cars, among them the one in question, were engaged in interstate commerce. It is difficult to see why he was not an employee engaged in the movement of interstate commerce to as full an extent as a switchman engaged in the making up of trains in the railroad yards, as in the case of *Chicago R. Co.* v. *King*, supra. From a consideration of the whole case we think the defendant a railroad company, engaged in

> interstate commerce. . . . that at the time plaintiff was injured the movement of the car was a movement by defendant in interstate commerce; that plaintiff was injured while a servant of defendant and in performance of his duty aiding in the movement of interstate commerce."

In *Zikos* v. *Oregon R. & N. Co.*, ubi supra, the plaintiff was engaged in repairing the defendant's main track, and was driving with a spike maul partially driven spikes further into the ties, for the purpose of tightening the joints of the rail, when a spike-head flew off and injured him. It was alleged that the spike was old, worn out, defective, and insufficient, which was known to the defendant and to its employees, who had theretofore placed it in position. The court overruled the defendant's demurrer.

Several questions arising under the Act of April 22, 1908, were discussed in this case, and we have cited it under other headings of our brief. As far as concerns the point now under discussion, it having appeared that the track upon which the plaintiff was working was used both for interstate and intrastate commerce, the court held, as in the Johnson case, that an employee repairing a track wholly within the State and used for both interstate and intrastate commerce is engaged in interstate commerce.

The court says:—

> No doubt there may be situations, indeed we have the highest authority for it (Empl.

> Liab. Cases, 207 U. S. 495), when instrumentalities that may be used for interstate or intrastate traffic, or both, but which at the time are not being used for either, as when engines or cars are undergoing repair, or in cases of electrical work when the acts or things done are not physically or otherwise directly connected with the moving of traffic, when there could be no ground for claiming liability under the Act of Congress, even though the carrier in fact be engaged in interstate as well as local traffic. But when the employment necessarily and directly contributes to the more extended use and, without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one although it may indirectly contribute to the other.

It is obvious from the context that, when the court speaks of "engines or cars undergoing repair," it means that the repairs are of such a character as to necessitate the withdrawal of the engine or car from any kind of traffic. This language of the court brings out the distinction which we wish to emphasize in the case at bar. The car under which Walsh was working when he was killed had clearly not been withdrawn from traffic, and the very work which he was doing was being done in order that such withdrawal might not be necessary.

We have not been able to find any other cases directly upon this point.

There is a class of somewhat analogous cases arising under State statutes abolishing or limiting the

fellow-servant rule, which, by their language or by the construction of the courts, are made applicable only to persons "exposed to dangers peculiar to railroad operation," or only to those employees "who are engaged in the operation of railroads." In these cases the courts have been called upon to decide whether the plaintiffs were at the time of injury exposed to dangers peculiar to railroad operation or were actually engaged in the operation of a railroad. Abstracts of these cases will be found in Thornton: The Employers' Liability, etc., Acts, in the footnote on page 45 *et seq.*

The case of *Callahan* v. *St. Louis Merchants' Bridge, etc., Co.*, 170 Mo. 473, contains a review of many of these cases and a comparison of the statutes of several of the States. The Missouri statute provides that railroad corporations shall be liable for all damages sustained by any agents or servants thereof *while engaged in the work of operating such railroad* by reason of the negligence of any other agent or servant thereof. The plaintiff was a member of a section gang which was engaged in repairing a track by taking out old ties and putting in new ones. The old ties were thrown down from a bridge into a street, and the plaintiff was stationed in the street to warn passers-by of the danger. It was the rule and custom that the men before throwing down a tie should give notice to the man below. While the plaintiff was warning off a child, a tie was thrown down without notice, and the plaintiff was injured. It was held that the plaintiff was

"engaged in the work of operating the railroad." At page 495 the court says:—

> It thus appears that everywhere, except in Iowa and Minnesota, the adjudications agree that it is not essential that the injury should have been inflicted by reason of the negligence of a fellow-servant while actually engaged in running a car, but that the injured employee may recover if injured by the negligence of a fellow-servant while they are engaged in doing any work for the railroad which was directly necessary for the operation of the railroad, and that even so sweeping a statute as that of Indiana was held by the Supreme Court of the United States not to be repugnant to or violative of the Federal Constitution.

It had been argued that, if the statute was construed to cover railroad employees who were not subjected to the hazards incident to the running of a train, but were only subjected to such risks as would be incurred by the employees of any other person or corporation when engaged in similar work, then the statute was unconstitutional. The case in this court, referred to, is *Tullis* v. *Lake Erie, etc., R.R. Co.*, 175 U. S. 348.

It seems unprofitable to consider further this class of cases, because there is a substantial difference in scope between the language of the State statutes construed thereby and the language of the Act of April 22, 1908.

In the Colasurdo case, above cited, Judge Hand says,—

> I think it [the Act in question] should therefore be construed as intending to include within the terms "persons employed in such commerce" all those persons who could be so included within the constitutional power of Congress; that is to say, the act meant to include everybody whom Congress could include.

There is no doubt that Congress had the power to include any employee engaged in interstate commerce, whether engaged in the operation of a railroad or not. It is true that by the terms of the Act the employer must be an interstate carrier *by railroad*, but, if the construction above be right, the employee falls within the protection of the Act, provided he is engaged in interstate commerce; and many acts of employees are therefore covered by the statute which are not acts done while the employee is "engaged in the operation of a railroad."

Suppose, for example, that a railroad engaged in interstate commerce undertook to transport interstate freight in wagons from one station in a city, across the city, to another station. While in transit across the city, an employee engaged in handling the freight is injured by the negligence of a fellow-employee engaged in the same work. Can there be any doubt, under the decisions, that the injured employee would be engaged in interstate commerce? He might, however, not be engaged in the oper-

tion of a railroad. Therefore, although we believe that, under the principles laid down in a majority of the cases arising under the State statutes above referred to, Walsh was engaged in the operation of a railroad at the time he was injured, nevertheless it would not prevent recovery in this case, even if he were not so engaged.

But however the class of employees who are engaged in interstate commerce is to be defined or limited, and wherever the line is to be drawn dividing those who are, from those who are not, so engaged, we submit that no proper definition or limitation of such class can be made, and no line can properly be drawn, which would exclude Walsh from the benefits of the Act. For

He was employed in interstate commerce.

He was employed in such commerce upon an interstate railroad.

He was employed upon an instrumentality of that railroad peculiar to railroad transportation.

The instrumentality upon which he was employed was then and there in active use in interstate commerce.

The object of his employment was to expedite the movement of interstate merchandise and to make such movement safe for the merchandise itself and for the persons engaged in its transportation.

The case having been submitted to the jury both on the question whether the defendant was a common carrier engaged in interstate commerce, and on the question whether Walsh received his injury while

employed in such commerce (Record, p. 53), and the jury having found a verdict for the plaintiff, this court must now hold, in order to set aside the verdict on this point, that there was no evidence which would justify the jury in finding, as they must have found, that both the Company and Walsh were engaged in interstate commerce at the time of the accident.

It is submitted that the trial court committed no error in leaving these questions to the jury.

IV.

The Rule as to the Measure of Damages and the Method of computing Damages as laid down by the Circuit Court.

The questions here involved are raised by the defendant's assignment of errors Nos. 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 50, 53, 54, 60, 61, 62, 65, 66, 67, 68.

The principal questions raised by these assignments of error are: What is the proper rule of damages for the death of a workman engaged in interstate commerce, under this Act; and are standard life and annuity tables, and evidence of the health and habits of the deceased, admissible in evidence in determining these damages? For the convenience of the court in the consideration of these assignments of error we shall discuss them generally instead of dealing with them specifically.

The court in its charge to the jury relative to damages (Record, pp. 60 and 61) stated:—

> Now, the damages, under the general rule, shall be compensable, and the measure of damages is compensation for the pecuniary loss sustained by the widow and children of the plaintiff's intestate. As a court the Federal Court has stated the amount to be recovered in a case similar to that is judged by his character, earning capacity, his habits and morals, and his cares and attention and solicitude for his children. The jury cannot proceed arbitrarily but with a proper consideration of the facts developed at the trial. It is for you to pass upon this question as reasonable men, what was the life of the plaintiff worth to the widow and children under such fair and reasonable rules as can be given and in consideration of reasonable men. I must leave it to you as reasonable men. You have before you what is the reasonable expectation of the life of this man. How long would he live? About what was he earning? About what was the cost of living? About what was he worth to that widow and children? What as age advanced would he be worth? If you find the expectation of life it is open for consideration whether or not his earning capacity might be more or less, whether up to a certain age it might be more or less, and the years that it would be less. It is for you to take into consideration all of these facts.

It will be seen that this statement of the rule of damages is substantially similar to the rule laid

down by Mr. Justice Harlan in *Louisville, etc., Railroad Co.* v. *Clark*, 152 U. S. 230, at p. 242, which is as follows:—

> It is assigned for error that the court below permitted the plaintiff, against the objection of the defendant, to testify as to the income of the deceased previous to his death. It is conceded by counsel that it was competent to have shown the testator's ability and capacity for labor as well as his skill in his calling. But it is insisted that the evidence as to his income for a particular period was not competent. We are of the opinion that the evidence to which the defendant objected was properly admitted. It tended, in connection with other evidence, to show the extent of the loss sustained by the widow and children on account of the death of the husband and father. The age of the deceased, his probable expectancy of life, his occupation, his ability to labor, his accustomed earnings, were all proper elements of the inquiry as to the compensation proper to be awarded on account of his death.

The question under consideration in that case was the construction of Section 284 of the Revised Statutes of Indiana (1881), providing for an action for death by the wrongful act of another, in words very similar to the Act which is under discussion. The exact words of that section will be found in Mr. Justice Harlan's opinion at page 235. (See also cases cited by Mr. Justice Harlan immediately following the above quotation.)

It is submitted that the language contained in the Act of 1908, under discussion, might be construed as broad enough to include damages by way of solatium in addition to mere pecuniary loss occasioned to the widow and children of the deceased by reason of his death, but obviously the court, in instructing the jury, limited the damages to such pecuniary loss only. And, therefore, the exception by counsel for the defendant at the close of the charge, which is set out on page 62 of the Record, and raised by the defendant's sixtieth assignment of error, to the effect that the court erred in charging the jury that there was compensation and damages as well, is not well taken because no such instruction is contained in the charge of the court, either in words or in substance. Counsel for the defendant also excepted at this same time (Record, p. 62) to the court's pointing out

> "that the measure of damages to the plaintiff's widow and children depended upon his solicitude and care as a father, and the specific instruction was what was that life worth to the widow and children and to the reasonable expectation as to what he would receive as life advanced, what he would be able to earn."

If under this exception and assignment of error (No. 61) the defendant shall argue that the court in charging the jury stated to them that they might allow damages to the widow and children for the loss of the deceased's solicitude and care as a hus-

band and father in addition to their pecuniary loss from the lack of such solicitude and care occasioned by his death, it is respectfully submitted that there is no ground for such an argument. For, the court not only stated to the jury at the beginning of the charge on damages that the measure of damages is compensation for the pecuniary loss sustained by the widow and children of the plaintiff's intestate, but proceeded to emphasize this by asking the jury to determine what the plaintiff's intestate was worth to the widow and children in view of what his reasonable expectation of life might be and how age might affect his earning capacity. The words, "what was he worth to that widow and children," as they appear in the charge, taken in connection with what came before, can only mean, what was his pecuniary value to the widow and children.

Passing now to the exceptions and assignments of error relative to allowing the actuary to testify from the standard life and annuity tables as to the plaintiff's probable expectancy of life, and as to the value of an annuity which would yield the amount which the plaintiff was earning, it is submitted that such evidence has uniformly been held to be admissible under such instructions as were given by the court in this case. For the court repeatedly stated that the life and annuity tables furnished no absolute rule, that the jury must take them for whatever they thought their probative value to be, and that such value depended upon other matters, such

as health, habits, surroundings, occupations, and other circumstances surrounding the plaintiff.

It will be noticed that the court was requested by both the attorney for the plaintiff and the attorney for the defendant to instruct the jury in language substantially similar to the above, and that he gave the instructions requested by both (Record, pp. 60 and 61).

In *Vicksburg & Meridian Railroad Co.* v. *Putnam*, 118 U. S. 545, at page 554, Mr. Justice Gray says,—

> In order to assist the jury in making such an estimate standard life and annuity tables showing at any age the probable duration of life and the present value of a life annuity are competent evidence.

In *Ritter* v. *Mutual Life Ins. Co.*, 169 U. S. 139, at page 152, Mr. Justice Harlan, in referring to standard life and annuity tables, says,—

> These tables are deemed of such value that they may be admitted in evidence for the purpose of assisting the jury in an action for personal injury in which it is necessary to ascertain the compensation the plaintiff is entitled to recover for the loss of what he might have earned in his trade or profession but for such injury [citing *Vicksburg, etc., Railroad Company* v. *Putnam* before referred to].

In *Pierce* v. *Tenn. Coal & Iron & Railroad Company*, 173 U. S. 1, at page 10, Mr. Justice Gray again says,—

> In order to assist the jury in making such an estimate standard life and annuity tables showing at any age the probable duration of life and the present value of a life annuity are competent evidence.

By assignments of error Nos. 17, 50, 53, and 54, the defendant alleges that the jury were misled by the testimony of the actuary as to the value of an annuity, in that the figures given by him represented the value of an annuity for nearly the entire amount of the plaintiff's gross income, and that deductions should have been made from that income for the cost of his own living and personal expenses. A short answer to this objection is that, although the actuary testified that such an annuity would be worth anywhere from $13,929 to $19,060, according to the table used, the jury awarded in damages only $5,500, much less than one-half the lowest figure named by the actuary. But, apart from that, it appears that the court stated to the jury the defendant's objection to this testimony, and told them that they were not bound by it, and that they must use this evidence with great care (Record, p. 61).

The assignments of error based on the admission of evidence concerning the plaintiff's health, weight, habits, and ability to work, are largely answered by the authorities and references, already cited, relating to the standard life and annuity tables.

For, if such tables are admissible, certainly such evidence must be admissible also.

In *Baltimore & Potomac R.R.* v. *Mackey*, 157 U. S. 72, at page 92, the following instruction was given by the trial court to the jury:—

> "Now, manifestly, you cannot estimate in dollars and cents exactly what the damages are in a case of this kind, if there be any at all. That is not possible. But you may and you should take into consideration the age of the man, his health and strength, his capacity to earn money as you discover it from the evidence, his family—who they are and what they consist of—and then, gentlemen, from all the facts and all the circumstances, make up your mind how much this family, if anything, probably lose by his death, and that would be how much had this family a reasonable expectation of receiving: how much had they a reasonable expectation of receiving while he lived, if he had not been killed."

Mr. Justice Harlan, in holding that the foregoing instruction was a correct statement of the law, says:—

> The statute giving the remedy expressly excludes the creditors of the deceased from any interest in the recovery, and declares not only that the judgment shall inure exclusively to the benefit of his family, but that the damages, not exceeding $10,000, shall be assessed "with reference to the injury" done "to the widow and next of kin of such

> deceased person." Under such a statute, it is entirely proper that the jury should take into consideration the age of the deceased, his health, strength, capacity to earn money, and family.

Such evidence as that in question was also held admissible by Mr. Justice Harlan in *Louisville, etc., Railroad Company* v. *Clark*, ubi supra, in a passage previously quoted from the opinion. See also the authorities cited at pages 242 and 243 of his opinion in that case, which lay down a similar rule.

In conclusion, we submit that the learned court by its instructions limited the damages to the pecuniary loss suffered by the widow and children of the deceased as a result of his death, and that by so doing it construed the statute as favorably as possible for the defendant. And, further, that, if the measure of damages is the pecuniary loss suffered by the widow and children, by reason of the death of the intestate, evidence bearing upon his probable expectancy of life, his health, strength, morals, occupation, and surroundings must be admissible as determining what that pecuniary loss amounts to.

The foregoing disposes of the greater number of the defendant's assignments of error relative to damages. There remain, however, several which have not been considered in all of their aspects, and these we now proceed to consider in the order in which they appear in the record.

The defendant's 14th, 15th, and 16th assignments of error raise the question of the admissibil-

ity of Mrs. Walsh's testimony that she was present when her husband was examined by Dr. Beckwith for life insurance, and that, subsequent to that examination, a policy was issued to him, upon which she collected money after his death. It is submitted that the defendant cannot now object to the admission of this evidence, since these facts were first brought out by him upon cross-examination (Record, p. 29); and it was not until the redirect that any inquiry concerning them was made by the plaintiff's attorney. It is also further submitted that the facts that the intestate had been examined for life insurance, and that such life insurance was afterwards issued to him and collected after his death, were admissible to show the probable state of his health at the time of the examination, and the issuing of the policy.

The plaintiff's request for ruling objected to in the defendant's 65th assignment of error contains a correct statement of the law, unless it may be said that the defendant should also be charged for the damages by way of solatium, growing out of the death of the deceased. Should it be argued under this assignment of error that the Act under discussion is a penal one, and that the damages awarded by it should be assessed as under a penal statute according to the degree of culpability, we submit that there is no ground for such an argument. For, by the statute itself, no distinction is made between the action brought by the injured party in his lifetime for injuries which he received

and the action brought by the administrator after his death for such death. As was stated by Mr. Justice Gray in *Huntington* v. *Attrill*, 146 U. S. 657, at page 667,—

> Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrong-doer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.

And again at page 683 he says,—

> The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offence against the public, or the grant of a civil right to a private person.

Damages awarded by this Act certainly are "the grant of a civil right to a private person."

The Massachusetts Statute of 1886, chap. 140 (Revised Laws, chap. 171), allowing actions for death, provides for damages

> "of not less than five hundred dollars nor more than five thousand dollars to be assessed with reference to the degree of his or its culpability."

In distinguishing this statute from Lord Campbell's Act, the Massachusetts Supreme Court stated that

> "The Massachusetts Acts are exactly what Lord Campbell's Act is not,"

and they hold the Massachusetts Act penal in its nature and different from Acts passed in other states which have copied Lord Campbell's Act.

> *Hudson, admr.*, v. *Lynn & Boston Railroad Co.*, 185 Mass. 510.

The Massachusetts Employers' Liability Act also provides that damages in case of death shall be assessed with reference to the degree of culpability of the employer. Judge Lowell, however, held this statute to be a remedial one, and that therefore an action based upon it could be maintained in the Federal Court.

> *Malloy* v. *American Hide & Leather Co.*, 148 Fed. 482.

In *Boston & Maine Railroad Co.* v. *Hurd*, 108 Fed. 116, at page 122, Judge Putnam, after reviewing many authorities, states,—

> There can be no question that the court regards statutes of this class as remedial, notwithstanding their form, and even when the proceedings must be by indictment.

In *Stewart* v. *Baltimore & Ohio Railroad Co.*, 168 U. S. 445, at page 448, Mr. Justice Brewer states:—

> A negligent act causing death is in itself a tort, and, were it not for the rule founded

> on the maxim *actio personalis moritur cum persona*, damages therefor could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the States, in more or less conformity to what is known as Lord Campbell's Act, is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the death.

The Maryland Statute under discussion in this case requires that the action be brought in the name of the State.

As stated in other places on our brief, the apparent purpose of the Act under discussion is that the employee or his family shall recover compensation for his injuries or death, and there is nothing either in the language of the Act itself or in the circumstances leading up to its passage to justify this court in interpreting it as a penal statute, or in awarding damages under it in accordance with the assessment of damages under such statutes.

V.

It is believed that the foregoing covers all the Company's assignments of error except Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 26, 30, 31, 32, 33, 34, 35, 36, 37, 38, 45, 46, 47, 48, 49, 51, 52, 55, 56, 57, 58, 63, and 64. Of these, Nos. 4, 5, 6, 7, 8, 9, 10, 11, 26, 29, 32, 33, 34, 35, 36, 37, 38, 55, 56, 57, and 64 are waived by the Company. The others will be taken up in order.

Assignment of Error No. 3.

This assignment is as follows:—

> The court erred in overruling the defendant's demurrer to the fifth count of the plaintiff's declaration.

This count having been waived and the case having been submitted to the jury upon the second count alone (Record, p. 62, last paragraph but one), the action of the court in overruling the Company's demurrer becomes immaterial.

Assignment of Error No. 30.

This assignment is as follows:—

> The court erred in allowing the plaintiff to propound the following question to the witness, James J. Hoban:—
>
> "*Q.* Where did it come from and where did it go to?
>
> Mr. HALL. That I object to.
>
> The COURT. Note the exception, and answer."

The question objected to was not answered. After the objection had been made, a new question, not objected to, was substituted. The witness answered this fully by stating, "I don't know the point." He then volunteered the information, "It came from down east." If counsel for the Company wished to argue that this was objectionable, he should have asked to have it stricken out as not responsive. He did not do so (Record, p. 43).

Assignment of Error No. 31.

This assignment is as follows:—

> The court erred in refusing to give the defendant's request for ruling No. 1: "Upon all the evidence the plaintiff cannot recover."

This assignment includes all the Company's objections to recovery by the administratrix in this action. As we believe that we have covered in our brief all the objections now relied upon by the Company, it is unnecessary at this point to deal with this assignment specifically.

Assignment of Error No. 45.

This assignment is as follows:—

> The court erred in refusing to give the defendant's request for ruling No. 17: "There is no sufficient evidence that would warrant the jury in finding that the plaintiff's intestate was injured by reason of any negligence of any employee of the defendant."

The court properly refused the ruling requested, because there was, we submit, sufficient evidence

of negligence of the defendant's employees. To state this evidence would be merely to repeat the statement of facts hereinbefore set forth.

Assignment of Error No. 46.

This assignment is as follows:—

> The court erred in refusing to give the defendant's request for ruling No. 19: "In order to recover for the negligence of the switchman, Williams, the plaintiff must show affirmatively by a fair preponderance of the evidence that at the time that Williams opened the switch to permit the cars to go on to 21 the blue light was upon the car and burning so as to apprise Williams of the existence of men beneath the car, or the plaintiff must show why by a fair preponderance of the evidence that Williams had some other reason to know that the men were beneath the car."

This instruction was given in almost the exact words of the request (Record, p. 55, next to last paragraph).

Assignment of Error No. 47.

This assignment is as follows:—

> The court erred in refusing to give the defendant's request for ruling No. 22: "There is no evidence that would warrant the jury in finding that the conductor Hoban knew or had reason to know in the exercise of reasonable care that there were men beneath car No. 85070 at work."

If the jury believed from the evidence that the lantern was burning, it was certainly competent for them to find that Hoban either knew, or, in the exercise of reasonable care ought to have known, that men were beneath the car in question.

Assignments of Error Nos. 48 and 51.

Assignment No. 48 is as follows:—

> The court erred in refusing to give the defendant's request for ruling No. 23: "If it shall appear that the plaintiff's intestate had an opportunity to warn the men of the switching crew that he was intending to work beneath the car under which he was injured and that it was the practice on the part of inspectors to inform the switching crew that they proposed to work beneath the car and that it would have been the exercise of due care on his part to have warned the switching crew if he had an opportunity so to do, then the jury may find that Walsh contributed to the injury and to the extent he contributed they may mitigate the damages, assuming that they find some officer, agent or employee of the defendant negligent."

The gist of this request is that, if a reasonably prudent workman, in addition to placing the light, would have given other warning to the switching crew, the fact that Walsh gave no further warning might be found to be contributory negligence and

used in mitigation of damages. The court instructed the jury as follows:—

> Now I instruct you, that if the jury find that the only rule with reference to giving notice was that the blue light should be displayed, and that no instruction outside of the rules had been given to Keating or the plaintiff's intestate to give other warning and a reasonably prudent workman would not have given any other warning, then you may be warranted in finding that the plaintiff's intestate was in the exercise of due care in going to work under the car after he, or Keating in his presence and to his knowledge, had placed a blue light on the car under which they were to work and if the jury find when the plaintiff's intestate went to work underneath that car either the plaintiff's intestate or Keating with the knowledge of the plaintiff's intestate put out a blue light on the car, the jury are warranted in finding that the plaintiff's intestate was in the exercise of due care. Unless they should find it to be the duty of a reasonably prudent man, under all the circumstances, to go further than the rule and to give further warning to the switching crew that they were going beneath the car.
>
> Record, p. 58, 2d and 3d paragraphs.

The court also instructed the jury:—

> So, if you come to that question and find damages, and find there was contributory negligence on the part of the plaintiff's in-

testate, you diminish the verdict by such amount as the negligence was attributable to this employee.

Record, p. 62, 1st paragraph.

Assignment No. 51 is as follows:—

The court erred in refusing to give the defendant's request for ruling No. 23 in terms and in giving it as modified.

This is covered by what has just been said in reference to assignment No. 48, since by that it appears that the instruction requested was given in substance and not modified in any material respect.

Assignments of Error Nos. 49 and 52.

Assignment No. 49 is as follows:—

The court erred in refusing to give the defendant's request for ruling No. 24: "The circumstances and exigencies of working at night in a freight yard where there are many tracks and a constant moving of cars and engines at varying rates of speed require from the men so employed the utmost vigilance to protect themselves from injury."

Assignment No. 52 is as follows:—

The court erred in refusing to give the defendant's request for ruling No. 24 in terms and in giving it as modified.

The defendant's request for instruction No. 24 was given in exact terms (Record, p. 58, last two paragraphs).

Assignment of Error No. 58.

This assignment is as follows:—

> The court erred in his instructions to the jury in that part of the charge relating to Williams opening the switch and the circumstances tending to place the lantern there.

If we understand this assignment correctly, it refers to that portion of the charge which is found at the bottom of page 55 of the Record, and, as already shown in the discussion of the 46th assignment of error, that portion of the charge was substantially the same as the defendant's own request for ruling, No. 19.

Assignment of Error No. 63.

This assignment is as follows:—

> The court erred in giving the plaintiff's 5th request to the jury: "If the jury find that the only rule prescribed by the Railroad Company to be observed by men working about or under cars at night was that they should display a blue light, and that such protection was adequate in a yard such as the plaintiff's intestate was working in, and under the conditions under which he was working, then they are warranted in finding negligence of the defendant or of its officers in setting the plaintiff's intestate to work or allowing him to go to work in the place in which he did under those conditions."

This request was not given. The court did say,—

> If you find that the only rule prescribed to be observed around and about the cars at night

> was that they should display a blue light, and that such protection was adequate in a yard such as the plaintiff's intestate was working in and under the conditions under which he was working, and was such care as a reasonably prudent man would have taken, then you are entitled to find negligence on the part of the defendant, under those conditions.
>
> Record, p. 55, paragraph 3.

While it might have been more exact, had the court said,—

> You are entitled to find negligence on the part of the defendant's employees if, under these conditions, they backed up another car against the car under which Walsh was working,

yet, taking this instruction with what came both before and after, the jury could not have been in any way misled.

It is agreed that the defendant may also argue its exception to the giving of the plaintiff's sixth request as modified. This exception was duly saved by the defendant at the close of the charge, and through inadvertence was not included in the assignments of error. The plaintiff's sixth request was as follows:—

> If the jury find that there was a blue light on the car under which Keating and the plaintiff's intestate were at work, then if any other employee sent, or in the execution of his

> duties, permitted another car to be moved against the car under which Keating and the plaintiff's intestate were at work, the jury are warranted in finding negligence on the part of the employees of the Railroad Company.

It is to be noticed, in the first place, that this request was not given in the form of a special instruction read to the jury, but was given as part of the main charge and was modified by what the court said both before and afterwards. Indeed, the exception was to the giving of the request *as modified*. While the whole charge may, in a sense, be said to modify this request, the parts which bear on it most directly are as follows:—

> Now, the fact that there has been an accident is not enough to show negligence on the part of anybody. Now, accidents happen without anybody being legally or morally at fault. So that it is for you to find whether or not under the language of the statute the plaintiff's intestate suffered and died as the result of the negligence of the defendant (Record, p. 53, 3d paragraph from bottom). . . . I do not understand in this case that there has been negligence such as would entitle the plaintiff to aver the negligence of any officer; I do not understand that any negligence has been alleged of any agent, except so far as an employee may be held to be an agent. So that you can consider whether or not there was any negligence of any employee of the defendant Company (Record, p. 54, 1st paragraph). . . . Now, then he says

that after Walsh having observed this rule (*i.e.*, of placing a blue light on the car under which he was at work), and that being his only duty as a reasonably prudent man, the observation of the rule of the defendant railroad Company, that some employee of the railroad company *was guilty of negligence*, namely, of letting a car to be switched in upon this switch and come down upon the car, resulting in the injury and death of the plaintiff's intestate. Now, the plaintiff urges that he does not confine this allegation of negligence to Williams, but as to Williams it was his duty to observe the light and that it was there, and that the testimony is negative testimony that while he says that there was no light there that must mean not seeing it, and was *negligent* in not seeing the light, and was *negligent* in switching the car down upon the track. Under the circumstances, in other words, the plaintiff's intestate had done everything a reasonably prudent man could have done, and some employee of the defendant was *guilty of negligence*. (Italics our own.) (Record, last paragraph, p. 54; 1st paragraph, p. 55.) . . . Now, then, the defendant urges, and it is true, that there is no evidence that Walsh or Keating told Williams that they were intending to work beneath the car; that in order to recover for the negligence of the defendant the plaintiff must show that at the time Williams opened the switch to permit the car of the defendant railroad to go on to 21 the blue light was burning on the car so as to apprise Williams of the existence of men beneath the car, or the plaintiff

must show by a fair preponderance of the evidence that Williams had some reason to know that the men were beneath the car. And I give the instruction if he had no reason to suppose the men were under the car, and no blue light was burning at that time, then the jury would not be warranted in finding that Williams was negligent.

What the plaintiff and the defendant urge in this matter bring you squarely to that question at issue, was the blue light burning on the car, and there is no question but if the blue light was burning and Williams with that light burning, allowed that car to go down onto that car under which the plaintiff's intestate was working, that the defendant was guilty of negligence and that you may properly find that the employees were negligent (Record, page 55, last two paragraphs; page 56, 1st paragraph). . . . And the plaintiff urges by a clear preponderance of evidence you must find that the light was burning and that owing to a mistake or carelessness it was not seen and that either *Williams or some employee was negligent and the result happened there from some negligence.* Now, that brings before you the consideration of the *negligence of the employee of the defendant,* which you are first to pass upon. *If you find that the plaintiff has not met the burden placed upon her of showing the negligence of some employee, then you will find for the defendant.* (Italics our own.) (Record, page 56, 3d and 4th paragraphs.)

If, under this exception, the defendant desires to argue that the plaintiff's sixth request was de-

fective, in that it said nothing as to the negligence of the employee in permitting another car to be moved against the car under which Keating and the plaintiff's intestate were at work, it is clear from the foregoing extracts that the court repeatedly stated to the jury that the basis of the plaintiff's claim was negligence, and that the plaintiff could not recover unless the jury were satisfied that negligence existed on the part of the defendant's employees. If under this exception the defendant raises the point that, in order to allow the plaintiff to recover in this case, the employees who permitted the car to be backed down upon the car under which the plaintiff was working must be engaged in interstate commerce, we beg to refer to that section of our brief in which this point is discussed.

Even if this request had been given without modification, we submit that it would have been correct.

For, if, without negligence on their part, the switching crew could have overlooked the blue light burning at the end of the car under which Walsh was at work, then obviously the placing of such a light was not a sufficient protection to the men at work under the car; and the jury might well have found that the Company itself was negligent in not requiring some further warning to be given.

Respectfully submitted,

ENDICOTT P. SALTONSTALL,
GEORGE D. BURRAGE,
Attorneys for the defendant in error.

BRIEF FOR THE PLAINTIFF IN ERROR IN THE CASE OF

MARY AGNES WALSH, Administratrix, *Plaintiff in Error*,

v.

NEW YORK, NEW HAVEN & HARTFORD R.R. COMPANY. No. 559.

The assignments of error by the administratrix, as plaintiff in error, are found in the Record at page 119.

The administratrix does not care to argue the questions raised by assignments of error numbered 1 to 6, inclusive, and the same are hereby waived.

Assignments of error numbered 7 to 10, inclusive, deal with the same matter, and may be considered together.

The seventh and eighth counts of the declaration are intended to set forth a cause of action under the laws of the State of Connecticut.

Gen. Stat. of Conn. (1902), sec. 4702.

The notice required by Gen. Stat. of Conn., sec. 1130, was duly given, and proof thereof was offered in evidence and excluded, exception being duly saved.

Record, p. 116.

The object of the administratrix in giving such notice, and in including the seventh and eighth counts in her declaration, and in saving her rights in regard thereto, has been, and is, to enable her to prosecute her action under the laws of the State of Connecticut, in case this court holds the Act of April 22, 1908, to be unconstitutional, or in case this court, for any other reason, decides that she is not entitled to the benefits of that Act.

Under these assignments of error we therefore ask that, if the Act is held to be unconstitutional, or if, for any reason, the administratrix is found not to be entitled to the benefit of the Act, the case may be remanded, in order that a trial may be had under the seventh and eighth counts.

Respectfully submitted,

ENDICOTT P. SALTONSTALL,
GEORGE D. BURRAGE,
Attorneys for the plaintiff in error.